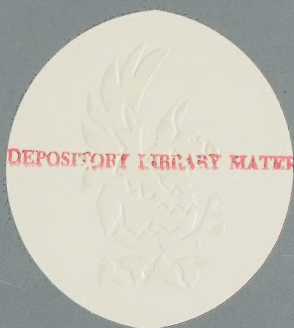


Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761115472490>

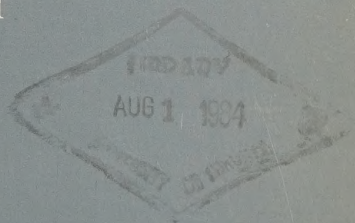
20N
7
756



**Ombudsman
Ontario**

**Annual Report
1983-84**

Volume I





The Ombudsman | Ontario

DANIEL G. HILL
OMBUDSMAN

125 QUEEN'S PARK, TORONTO, ONTARIO
M5S 2C7
TELEPHONE (416) 596-3300

June 15, 1984

The Speaker
Legislative Assembly
Province of Ontario
Queen's Park
Toronto, Ontario

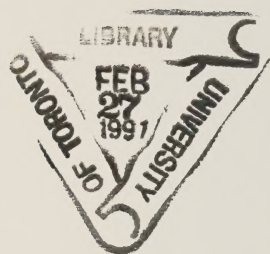
Dear Mr. Speaker:

It is an honour and a pleasure to present the
Eleventh Annual Report of the Ombudsman for the period
April 1, 1983 to March 31, 1984.

This report is submitted pursuant to section 12
of the Ombudsman Act.

Yours sincerely,

Daniel G. Hill





DR. DANIEL G. HILL

OMBUDSMAN'S MESSAGE

As the newly appointed Ombudsman for the Province of Ontario, I look forward to the responsibilities and tasks that lie ahead.

Although I have not long been Ombudsman, I am already convinced that the Ombudsman is one of the institutions essential to a society under the rule of law, a society in which fundamental rights and human dignity are respected.

The right to complain, the right to be heard, and the right to have corrective action taken if one has suffered harm from Government are human rights.

Human rights and fundamental freedoms - the various civil, political, social, economic and cultural rights and freedoms - are proudly set forth in many state documents, particularly the Universal Declaration of Human Rights, of which Canada is a signatory. However, these rights and freedoms, so essential to the dignity of man, are only words and phrases without substance unless accompanied by effective governmental machinery which will implement the documents.

I believe that the Office of the Ombudsman embodies such machinery. By affirming that the administrators of government are accountable for their actions, by establishing a grievance-handling mechanism which provides easily accessible review, flexible disposition of complaints, and speedy judgment, the Ombudsman Act, passed in 1975, was the culmination of a number of human rights statutes enacted in Ontario. The Ombudsman Act stands as a testament to the commitment of our legislators to safeguard the rights of individuals.

As an officer of our legislature independent from the executive, I anticipate a cooperative relationship with all 125 members of the Assembly. With a mutual commitment to the function of the Ombudsman, we shall together serve the people of this province.

It must be remembered that the Ombudsman is not only the person, but also the function. The function of the Ombudsman is to investigate complaints against administrative decisions and acts of officials of the Government of Ontario and its agencies.

But to this function, every incumbent brings a personal legacy and philosophy. Throughout my life I have worked in the field of human rights. As Ombudsman, my policy for this office will reflect this commitment and I welcome this opportunity to share my commitment with you.

The Office of the Ombudsman is in the position to look critically at government organizations and must itself strive to be exemplary.

While I am Ombudsman, this office will be committed to the spirit of the Ontario Human Rights Code, and its policy:

... to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province, ...

In keeping with the aims of the Code, I will pursue the following policies:

1. Equal employment opportunity and equal access to services for all persons regardless of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status, or disability.
2. The monitoring of all employment practices of this office to ensure that these practices are fair and equitable.
3. Periodic review of the staffing policies and services of the office, and equal opportunity programs to correct any imbalances revealed by such reviews.
4. Provision of reasonable services for the needs of the disabled.
5. Provision of multilingual information and services to the extent necessary to assure that all members of the community have access to the Ombudsman's services.

In this regard, I have just appointed the first female Executive Director for the Ombudsman's Office, in the person of Mrs. Eleanor Meslin. Mrs. Meslin is a senior administration and management professional who has been involved in human rights and community activities throughout her life. As Executive Director, Mrs. Meslin will be responsible for the day-to-day administration of the Office which has a staff complement of 122 members, as well as for the evaluation and updating of these policies, and for their ongoing implementation.

I have been frequently asked - what rights should a citizen enjoy when dealing with Government?

In my opinion, all persons are entitled to fair, just and reasonable treatment from government authorities and every person in dealing with our provincial authorities is entitled to the following:

1. Respect for individual rights and personal dignity.
2. Prompt and clear responses to all requests for information or action.

3. Decisions that are arrived at without undue delay.
4. Decisions which are based only on relevant considerations, and on all relevant considerations.
5. Clear statements of the reasons for all decisions.
6. Clear and adequate notice of pending decisions.
7. A reasonable opportunity to be informed of relevant facts and law upon which decisions are based.
8. The opportunity to respond to any point in the decision-making process with additional relevant information.
9. Clear information about rights of appeal against any decision affecting them and reasonable assistance in pursuing appeal procedures.
10. Clear information with respect to government policies and actions, presented in a manner understandable to all those affected.

Such considerations might almost be called a Bill of Administrative Rights for citizens dealing with the authorities. If they were adhered to in the relationship between the people and the provincial authorities, I would venture that fewer complaints would come to the Ombudsman's attention.

Certainly, I will use these considerations both as a yardstick to measure the performance of administrative agencies and also as an aid to assist me in arriving at my conclusions and forming my recommendations.

The Office of the Ombudsman primarily performs an investigative function. I believe that this office can also be a community resource. Ultimately, we are here to help people. Although most of our resources are expended on jurisdictional matters, this office has, over the years, developed an extensive and sophisticated referral system. We have senior staff members who are experts in various government policy fields, agencies and programs. It is my intention to use these resources to the fullest. If the problem that is brought to us is not within our jurisdiction, no person will leave my office

without at least a competent and exhaustive referral.

To borrow an image from Greek mythology - the Office of the Ombudsman can be a kind of Ariadne's thread through the labyrinth of government, an agency that will ensure that the citizen will not get lost when he enters the maze.

But first, the people must find out about my office. Since the taxes of every citizen in the province are paying for this office, it is my belief that every citizen has a right to know about it. To accomplish this, I intend to initiate a public education and outreach program - one that I hope will touch every community in this province - particularly the more remote areas in Ontario.

I intend to broaden our base of contact, especially with the voluntary and community organizations in this province.

It is my intention to try to reach all of our people with the message that we exist - that we exist to inform them of their rights - and to protect those rights against abridgement by administrative agencies.

My door will always be open to the citizen who feels aggrieved. As long as I am Ombudsman, I hope to be able to say - as was said by an ancient Roman leader, Terence, the son of a Libyan slave, - "I am a human being and nothing human is foreign to me."

A handwritten signature in dark ink, reading "Daniel G. Hill". The script is cursive and fluid, with the first letters of each word being capitalized and prominent.

Daniel G. Hill

HIGHLIGHTS

This is the eleventh occasion for tabling an annual report in the Legislative Assembly. The report deals with the activities of the Ombudsman's Office from April 1, 1983 to March 31, 1984.

- This report is published in two volumes. Volume I is an overview of the operations of the Office. Volume II deals with recommendations made by the Ombudsman that were denied by various governmental organizations.
- An attempt is made to make the case summaries more readable by reducing detail and providing brief introductions for each summary.
- For the first time, this Office is publishing information about its budget expenditures. The Ombudsman believes that the public has a right to know how this Office is spending public money. (See fig. 5, p. 18)
- This year we are able to report the lowest figure ever (959) for files in progress at the end of the fiscal year.
- This year the Select Committee on the Ombudsman paid a historic visit to Northern Ontario and had a first-hand look at the operations of our regional staff.
- New "aerograms" have been introduced by our Office for use by inmates of correctional facilities.
- Citizens' comments about our Office are included for the first time.
- The Ombudsman outlines his conception of "Bill of Administrative Rights".

TABLE OF CONTENTS

	Page
Ombudsman's Message	1
Highlights	4
Introduction	6
Past Fiscal Year	6
Regional Offices	6
Private Hearings	7
Select Committee Visit to Northern Ontario	7
Supreme Court of Canada, British Columbia Ombudsman	7
Vancouver Conference	8
New Envelopes for Inmates	8
Nigerian Training Program	8
Case Summaries	9
Statistical Information	17
Budget Expenditures	18
Recommendations Denied	32
Citizens' Comments	33
Ontario Ombudsman Staff	34
Language Facilities	35
Ontario Ombudsman Offices	35
Members of the Select Committee on the Ombudsman	36

INTRODUCTION

This Report covers a period of time from April 1, 1983 to March 31, 1984 and as such, spans the period from April 1 to July 14, 1983 when the Honourable Donald R. Morand was still Ombudsman and from July 15 to February 19, 1983 when Mr. Frank McArdle was the Temporary Ombudsman, plus the period of time from February 20 to March 31, 1984 when I had been appointed as Ombudsman.

I wish to thank both the Honourable Donald R. Morand and Mr. Frank McArdle for their stewardship of this important post.

I believe that the Annual Report of the Ombudsman, beyond being the fulfillment of a statutory requirement, can be an important vehicle to educate the public about the role and function of the Ombudsman.

For this purpose, the format for this and for subsequent reports will be changed to make our report more reflective of the work performed and at the same time be more readable. To this effect, the report has been divided into two volumes.

Volume I gives an overview of our last fiscal year and presents a selection of case summaries which explain how the Ombudsman approaches his job and the complaints before him.

Volume II is devoted entirely to detailed summaries of recommendation-denied cases and tables of recommendations outstanding from past reports. We have found from past experience that this highly technical material is of limited interest. However, it will be made available to any interested reader.

PAST FISCAL YEAR

In commenting on the past fiscal year, 1983-84, I am pleased to report a trend toward greater efficiency. Although there was no significant increase from previous years in the number of complaints and information requests received (2,786 files opened; 9,882 fast action complaints and information requests), we are able to report the lowest number of in-progress files (961) at the end of a fiscal year since the Office was instituted in 1975. (See fig. 3, p. 17)

I am also able to report the highest number of complaints and information requests closed

(13,732) by this Office since its inception. (See fig. 3, p. 17)

As in the previous annual report, duration-to-closing statistics are presented in this report and they are expressed by the number of complaints closed within a given period of time. (See fig. 4, p. 17)

These duration-to-closing statistics are not significantly different from the previous year, with one exception. Although almost 80% of the complaints and information requests received were closed within one month, 629 of our total required more than 12 months to close. During fiscal year 1982-83, a total of 921 required more than 12 months. Although the number of complaints requiring more than a year to close has been reduced by almost one-third, I believe the duration-to-closing times can be significantly improved. That the trend toward greater efficiency be continued by this Office will be a priority while I am Ombudsman.

The statistical record-keeping functions of this Office are presently under review with the expectation that future reports will contain statistical information that is simple, accurate, readable and more reflective of the work performed.

THE REGIONAL OFFICES

The Ottawa regional office was officially opened on May 27, 1983. That office plus our offices in North Bay and Thunder Bay have proved to be successful and cost-efficient, rendering excellent service to the northeast, north-central and northwest portions of the province. Given the number of complaints we receive from this region, our cost analyses reveal that it is more efficient to open a regional office rather than send personnel from Toronto on a regular basis into that region.

During the last fiscal year, fifteen percent of all of our complaints emanated from Northern Ontario, an area which has less than ten percent of our total population. (See fig. 1, p. 17)

It is my intention to enhance the operational capabilities of our regional staff so that the people in the north will have equal access to the services of this office. The details of my program will be available in subsequent reports.

PRIVATE HEARINGS

During the last fiscal year, our Office conducted private hearings in 105 communities in this province, of which 12 were held at Native Indian reserves. A total number of 1746 complaints and information requests were received from these communities.

I am convinced that it is essential for this Office to maintain a program of contact with every segment of Ontario's population. The question of whether the "private hearings" format, as employed by this Office in the past, is the optimum method, is under review. But the principle of the Ombudsman's reaching out to and making contact with and educating every segment of Ontario's population about our role and function will not be compromised.

SELECT COMMITTEE VISIT TO NORTHERN ONTARIO

During the week of January 9-13, 1984, the Select Committee on the Ombudsman, accompanied by members of our staff, visited various communities in North Eastern Ontario. This historic trip - historic in the sense that these members represented the first such Committee to visit Ontario's North and its Indian Reserves - enabled them to gather information on conditions and problems in North Eastern Ontario, and gave them the opportunity to witness on location our efforts and assess our needs and requirements to serve these communities.

It is indeed gratifying and morale-boosting that the Committee has shown such interest in our efforts to service the North, especially the efforts of our regional staff. We strongly encourage the Select Committee to visit Regional Offices on a regular basis. Their suggestions and recommendations as to how we can improve our services to the citizens of Ontario are most welcome.

SUPREME COURT OF CANADA,

BRITISH COLUMBIA OMBUDSMAN

In 1983, the Ombudsman of Ontario intervened in an appeal before the Supreme Court of Canada.

The Ombudsman of British Columbia had decided to investigate a complaint against the British Columbia Development Corporation. The British Columbia Development Corporation took the view that the Ombudsman could not investigate its decision to refuse to renew a lease of one of its tenants. The Court of Appeal of British Columbia decided that the Ombudsman did have the authority to investigate this decision and the British Columbia Development Corporation appealed to the Supreme Court of Canada.

The issues involved in this matter were of sufficient significance that the Ombudsmen of Ontario, Saskatchewan and Quebec intervened on the side of the B.C. Ombudsman. Indeed, all the provincial Ombudsmen were vitally concerned with the outcome of this important case.

At issue was the meaning to be given to the term "a matter of administration". This Office took the position that the decision of the British Columbia Development Corporation to refuse to renew its tenant's lease was a matter of administration, or in the terms of the Ontario Ombudsman Act, "a decision made in the course of the administration" of the British Columbia Development Corporation.

In addition, the issue of whether the tenant was aggrieved, or in the Ontario Ombudsman Act terms, "affected in its personal capacity" was argued, and whether the term "person" used in both the British Columbia Ombudsman Act and in the Ontario Ombudsman Act excludes a corporation. Our counsel argued that the tenant of the British Columbia Development Corporation was aggrieved and that a person does include an incorporated body.

The appeal was heard by five judges of the Supreme Court of Canada on January 30, 1984. To date, a decision has not been given. I will be reporting the results of the Supreme Court case in my next report.

VANCOUVER CONFERENCE

In September 1983, the Temporary Ombudsman and members of our staff attended the Conference of Canadian Legislative Ombudsmen, hosted by Dr. Karl A. Friedmann, Ombudsman for British Columbia.

Dr. Friedmann is to be commended for a full and very rewarding program. Present and past Canadian Ombudsmen, including Mr. Arthur Maloney, Q.C., were in attendance, as well as Ombudsman representatives from around the world.

It was gratifying to see the presence of the Ontario Select Committee on the Ombudsman. The Committee's Chairman, Robert W. Runciman, presented a thoughtful paper on the relationship between Ombudsmen and legislators. Such participation can only enhance the Committee's perception of the role and function of the Ombudsman. Hopefully the Committee will participate in all such future conferences.

NEW ENVELOPES FOR INMATES

According to Section 17(2) of the Ombudsman Act, all correspondence from inmates in provincial correctional institutions addressed to the Ombudsman is to be immediately forwarded unopened.

Prior to February 1984, inmates wrote letters on separate sheets of paper which they sealed in pre-addressed Ombudsman envelopes.

We have now revised these envelopes and they take the form of "aerograms" - the body of the letter and the envelope are one and the same.

These envelopes were designed to encourage brevity and conciseness on the part of inmates and to minimize the possibility of tampering.

NIGERIAN TRAINING PROGRAM

During 1983, the Office was requested by the Public Complaints Commission of Nigeria to provide training in techniques of investigation and office administration for its staff. In October, four representatives arrived - the Secretary

for Administration, Mr. B.D. Sadare, and three investigation officers, Mr. S.A. Achimuga, Mrs. T.R.T. Ojigbo, and Mr. Francis Odunayo.

They spent three memorable weeks with us and we wish to thank them for sharing their culture, their comments and observations, and above all their friendship, with our staff.

CASE SUMMARIES

The Ombudsman believes that the right to equal treatment by provincial authorities is a human right. The following case illustrates how the Ombudsman can play a conciliatory role to protect this right.

Case Summary 1

This complaint was against the Ministry of Colleges and Universities. Three complainants were all patients at a provincial psychiatric hospital, on Warrants of the Lieutenant Governor, and they contended that they were denied admission to the local community college because of their status, notwithstanding the fact that their Warrants had been "loosened" by the Lieutenant Governor's Advisory Review Board to allow for their education in the community. They stated that the college had advised them that their applications would only be considered if information from their medical records at the hospital, concerning their offences and medical history, was made available to the college.

The President of the college stated the college's position that applicants subject to Warrants of the Lieutenant Governor have special needs, and because the college was unable to obtain information from the hospital pertaining to those needs, it was impossible to properly make an admission decision respecting the three complainants.

The President also indicated that because the college was responsible for public funds, it had an obligation to assess the suitability of an applicant for a particular program, based on certain criteria. In the complainants' case, the criteria could not be applied because certain essential information was unavailable.

The complainants, on the other hand, wished to have their applications for admission processed without regard to their legal status or medical history; that is, they wished to be treated in the same manner as any other applicant.

The Manager of Student Services and the Counsellor involved at the college advised that the college did not propose that patients on Warrants of the Lieutenant Governor be banned from the campus, but felt that the College was entitled to receive background information on this type of applicant, since they had committed violent crimes in the past. Concern was expressed for the welfare of the student population, and in order to further reduce the threat of recidivism, it was felt that all patient applicants should be interviewed as a pre-condition to admission, by a Counsellor who was fully informed about their backgrounds.

Members of the Ombudsman's office met with the President and Vice-President of the college, the Manager of Student Services, the Counsellor and Principal of the campus involved, and with the Administrator of the psychiatric hospital, to discuss the complaint.

After this meeting, a letter was received from the President of the college, outlining his proposal for the resolution of the complaint.

The President stated that the college was prepared to consider the patient applicants for admission on the same basis as other applicants, which would necessarily involve an objective assessment by an experienced Counsellor of their likelihood of succeeding in the program, based on performance on standardized aptitude and skill-level tests. They would also be subject to the same expectations and sanctions as other students respecting academic progress and general deportment, in accordance with college policy. They would not however, be required to consent to the release of medical information from their files at the hospital.

This information was given to the complainants, who agreed with the proposal.

Many complaints would probably never reach the Ombudsman if governmental organizations provided complete information to the clients they serve. In the following case, the Ministry of Consumer and Commercial Relations gave effect to our recommendation

that the Motor Vehicle Accident Claims Fund prepare a more informative notice for uninsured motorists who approach the Fund for assistance prior to default.

Case Summary 2

In 1977, the complainant was involved in a motor vehicle accident which caused physical injury to a pedestrian child. At the time of the accident, motor vehicle insurance was not compulsory, and the complainant had paid the uninsured motorist's fee to permit him to drive without insurance. Upon being served with a writ of summons by the injured party, the complainant notified the Motor Vehicle Accident Claims Fund (the Fund) and was asked to and did sign, Form NC-16.

This form was the only document shown to the complainant. It purported to authorize the Minister of Consumer and Commercial Relations to intervene and handle the action on the uninsured complainant's behalf. In addition, the form stated that the undersigned agreed to reimburse the Fund for any monies paid out. The form did not, however, state anything about the possibility of suspending the complainant's driver's licence until the Fund had been reimbursed, or of the possibility of settlement without notification.

During this investigation, officials of the Fund testified that in general, information as to the likelihood of settlement would only be given if specific questions were asked by the motorist. Such issues would, therefore, only be discussed if a motorist already understood the intricacies of a legal action such as the option of settling. The officials of the Fund agreed with the complainant that little information was conveyed to him regarding settlement when he first attended at the Fund for guidance.

The Fund proceeded to negotiate a settlement with the injured party's solicitor. The complainant was contacted once by insurance adjusters retained by the Fund. During this meeting the complainant told the adjuster that he was not willing to pay any amount regarding a settlement and that he wanted to defend the action in court. The Fund subsequently settled the action and paid the injured party \$4,131.00. The complainant was then notified that his licence had been suspended until arrangements were made to

repay the \$4,131.00 to the Fund.

During the course of the investigation the Ombudsman formed a tentative opinion that the Fund acted unreasonably by not having made clear to the complainant the options open to him and the possible consequences of pursuing those options when he first came to the Fund for assistance. The Ombudsman also found it open for him to conclude that use of form NC-16 was unreasonable, since it may have been misleading to the uninsured motorist with respect to the issue of contesting liability. A preliminary recommendation was therefore made that the Fund cease using form NC-16 and prepare a new notice or form, to be given to uninsured motorists who approach it for assistance, which properly outlines the motorist's legal position in relation to the Fund. He also tentatively recommended that the complainant's debt to the Fund be reduced by 25% as compensation to the complainant for the Fund's actions in this matter.

The Ministry responded to the Ombudsman's tentative conclusions by stating that it could not agree that form NC-16 was lacking or that uninsured motorists were not properly informed as to their relationship with the Fund. The Ministry was also of the opinion that it had no power under the Motor Vehicle Accident Claims Fund Act to waive all or any portion of an uninsured's indebtedness to the Fund.

In reviewing the Ministry's response, substantial consideration was given to the Fund's powers under the Act. Once an uninsured motorist defaults in his or her defense of an action, the Ministry legally gains carriage of the action. However, these powers do not exist prior to default. At this stage, a motorist such as the complainant is attending at the Fund for information and guidance and he must be advised in no uncertain terms of the obligation of the Fund to provide prompt and fair compensation to entitled plaintiffs. As an uninsured motorist has to eventually pay back to the Fund any monies paid out on his or her behalf, he or she of course has an interest in the amount being as minimal as possible. This being so it is of paramount importance that the motorist be informed as to various options, such as contesting liability which the complainant in this case was prepared to do.

The Ombudsman concluded that it was unreasonable of the Fund not to have made very clear to the complainant the options open to him and the possible consequences of pursuing those

options when he first came to the Fund for assistance. Secondly, it was the Ombudsman's view that the use of form NC-16 was unreasonable as it may be misleading to the uninsured motorist.

Thus the Ombudsman recommended that the Fund cease using form NC-16 and prepare a new notice or form to be given to uninsured motorists who approach it prior to default. This document should carefully outline the motorist's options and the consequences of pursuing them. Further, a recommendation was made that the Fund take all necessary steps to arrange the reduction of the complainant's debt by 25%. While the Ombudsman agreed with the Ministry that the entire debt should not be forgiven, it was felt that the Fund should be prepared to compensate the complainant, given the circumstances in which his claim was handled, to the extent of 25% of the indebtedness. It was noted that there was nothing in the legislation which prevented the Minister from so acting on our Office's recommendation.

The Minister agreed to give effect to the recommendation to prepare a new notice to be given to an uninsured motorist approaching the Fund prior to default. As well, the Ministry agreed to reduce the complainant's debt to the Fund by 25%.

Governmental organizations usually base their decisions on available information. In the following case, the Ombudsman was able to resolve a complaint simply by bringing more information to the attention of the authorities.

Case Summary 3

The complainant first wrote to our Office in June, 1982 explaining that she had been awarded an Ontario Study Grant totalling \$4,150 for the academic years 78/79 and 79/80. By letter dated December 24, 1980, she was informed by the Ministry that her application had been reassessed by the Verification Section of the Student Awards Branch, and it had been determined that she was not entitled to the grant and would be required to repay the full amount.

The complainant was of the view that she should not have been assessed on the basis of her parents' income as she had been living away from home since the age of sixteen. She felt that she

should have been assessed as an independent student and she found it unreasonable of the Ministry to require her to repay the grant.

The Ministry policy regarding independent students requires the student to have worked for three periods of twelve consecutive months or more. In this case the Ministry was of the opinion that the complainant had only worked two full years and not three, and that the complainant's status therefore was that of a dependent student requiring repayment of the grant.

The complainant insisted that she met the Ministry policy for independent status as she had been working for three years. The investigator therefore suggested that her former employers be contacted in order that their statements with respect to her employment might be verified.

Employment statements were received from various former employers which, in conjunction with a detailed working history provided by the complainant, illustrated that she had been employed for three years and three months.

Copies of this information were sent to the Ministry. In a letter dated June 13, 1983, the Ministry advised the Ombudsman that it had now established that the complainant had been a full-time employee for 3 years. As a result, the reassessment requesting payment of the \$4,150 was cancelled. Since an independent student would have been entitled to an amount greater than what she received, the Ministry issued a cheque in the amount of \$1,852 to cancel the outstanding balance of her Canada Student Loan indebtedness.

Administrative delay is one of the most common causes of complaint against government. In the following case, an inmate of a provincial correctional centre was held four days beyond his release date because of administrative delay.

Case Summary 4

On May 30, 1983 the Office of the Ombudsman received a letter forwarded from a complainant from southern Ontario. The complainant expressed concern over the apparent delay in being released from a correctional centre in November, 1982. The complainant was released four days after his bail release papers

arrived at the institution. Consequently, he requested financial reimbursement from the Ministry for lost wages equalling approximately four days employment.

The Ministry's response indicated that in the spirit of cooperation the Ministry was prepared to offer the complainant the sum of three hundred dollars (\$300), recognizing that the Ministry did not have any documented evidence or statement that his financial earnings were, in fact, approximately one hundred dollars a day and that such earnings were on a regular basis. A condition of the proposed settlement was that the complainant agree to sign a "release of liability" for the Ministry.

The complainant was advised of this information by a member of our investigative staff, and stated that he was satisfied with the measures proposed by the Ministry. After the necessary documentation had been signed, the Ministry sent the complainant a cheque for \$300.00.

Before the Ombudsman can support a complaint, his investigation must determine that the actions of the governmental organization were "contrary to law" or "unreasonable" or "unjust" or "oppressive" or "improperly discriminatory" or "based ... on a mistake of law or fact" or "wrong". In the following case, as in the majority of jurisdictional complaints, the actions of the governmental organization could not be so described, and the Ombudsman was unable to support the complaint.

Case Summary 5

An elderly married couple believed that the Ministry of Revenue had acted unreasonably in deciding to recover \$750 from them on the basis that they had been overpaid in 1980 and 1981 for the Ontario Pensioners' Property Tax Grant.

Our investigation confirmed that in September 1980, the husband completed an application for an Ontario Pensioners' Property Tax Grant indicating his marital status as widowed. He did not complete the space reserved for indicating changes in marital status and the date of such change. The wife also completed her application after having been married, indicating

her marital status as widowed, and leaving blank the space reserved for indicating a change in marital status. On the basis of this information, the Ministry sent the complainants each a cheque for \$500, the maximum allowable grant for 1980. In the spring of 1981, the Ministry sent them each a cheque for \$250 as a first payment toward the 1981 grant, with the balance to be sent upon receipt of a completed application form. The husband realized that he and his wife were not eligible for two grants in 1981 since they were a family unit, and he so informed the Ministry, but did not return any money.

When the Ministry discovered that the couple had married in 1980, it concluded that they should not have each received \$500 in that year (for a total of \$1,000) but rather, only one grant of \$500 between them. The Ministry asked that they return \$750 (\$500 for 1980 and \$250 for 1981). The complainants refused, arguing that at the time they paid their property taxes, they were not married and were therefore each eligible for a \$500 grant.

The investigation also included an examination of the provisions of the Ontario Pensioners' Property Tax Assistance Act, which came into force on July 1, 1980. The Act defines "family unit" as "an individual and his spouse", and states that the Minister shall pay only one grant to a family unit in each year. On May 20, 1981, an amendment to the Act allowed a husband and wife who were both eligible persons to make an application for a grant as a family unit for the year in which they married and a further application for a grant may be made by one of the spouses for the occupancy costs in that year prior to marriage. Provided that such occupancy costs were not included in the application made for that year by the family unit, the Minister may pay such grant. The Act also provides for recovery of any grant paid to a person not entitled to receive it.

In considering the actions of the Ministry of Revenue in this case, the Ombudsman noted that the Ministry had acted in accordance with the relevant legislation in allowing the complainants only one grant of \$500 for 1980, and in recovering the overpayment from the subsequent year's grant. While it could be argued that the Act, prior to the amendment made in 1981, improperly discriminated against senior citizens who married in 1980, the amendment corrected the situation. The amendment was not retroactive, and the Ombudsman could not therefore find any basis on which to make a recommendation that this couple

be entitled to a larger grant than that provided to any other couple who married during 1980. With regard to the complainants' contention that they felt that the information requested regarding marital status related to the time at which property taxes were paid, the Ombudsman noted that there was nothing in the wording of the application which would convey this impression. The investigation did not however, reveal any information to indicate that the complainants deliberately attempted to fraudulently obtain money to which they had no right. In fact, it was the husband himself who contacted the Ministry in 1981 after it mistakenly sent him and his wife first installments on that year's grant to which they were not entitled.

Since the investigation did not reveal any facts which would lead the Ombudsman to conclude that the Ministry had acted unreasonably in this case, he was unable to support the complaint.

The Ombudsman will support a complaint when the actions of the Ministry are contrary to law. In the following example, the legal issue was the provision of the Family Benefits Act that the Director is authorized to recover an overpayment only from the person who receives it.

Case Summary 6

In November 1981, the complainant was advised by the Ministry of Community and Social Services that he was being charged with a Family Benefits overpayment of \$30,834.78. This followed an investigation by the Ministry which had concluded that the complainant's common-law spouse had improperly received Family Benefits as a single parent from 1973 to 1979. The overpayment recovery was being made by monthly deductions of \$25 from his own Family Benefits cheque.

Our investigation revealed that following disclosure by the complainant's common-law spouse that they had been living together for six years, the Ministry cancelled the spouse's Family Benefits, assessed her with an overpayment of \$30,834.78 and charged her and the complainant with fraud. The spouse pleaded guilty to defrauding the Ministry of approximately \$5,000 and she was given a suspended sentence upon payment and restitution of \$3,000. The charges of

fraud against the complainant were dismissed by the court. As the complainant's spouse was no longer receiving Family Benefits, the Ministry could not recover the overpayment by making deductions from her allowance. In order to recover the money, the Ministry transferred the overpayment charge to the complainant, who in 1980 had been granted Family Benefits in his own right. The complainant objected to the Ministry's charging him for a debt which he did not incur, and appealed to the Social Assistance Review Board. The Board affirmed the decision of the Director.

After reviewing the relevant legislation, the Ombudsman formed the tentative conclusion that the decision of the Director of Income Maintenance to transfer the overpayment to the complainant was contrary to law. In support of this tentative conclusion, the Ombudsman noted that the Family Benefits Act provides that the Director is authorized to recover an overpayment only from the person who receives it. The Ombudsman noted that while there was a debt due to the Crown in this case, it was not, in his view, a debt owed by the complainant.

The Ombudsman tentatively recommended that the Director of Income Maintenance cancel his decision to transfer the overpayment to the complainant and apply what monies had already been deducted from the complainant's allowance to the recovery of a small overpayment which the complainant had on his own account. In his letter of response, the Assistant Deputy Minister of Community and Social Services advised the Ombudsman that the Ministry was prepared to accept his tentative recommendation and cancel the transfer of the overpayment. In addition, the Ministry agreed to apply the monies which had been paid by the complainant to his own overpayment on account.

Achieving necessary procedural changes in government agencies is an important part of the Ombudsman's function. As a result of the following case, the Employment Standards Branch established a special collections unit to deal with recalcitrant and insolvent debtor-employers.

Case Summary 7

In this case, a chef complained to the Ministry of Labour's Employment Standards

Branch that he had not been fully paid by his former employer. The Branch's investigation confirmed that he was owed approximately \$2,500 and an Order to Pay was issued, but the employer refused to pay. The Employment Standards Branch filed a certificate for the amount in a small claims court outside of Metropolitan Toronto and informed the complainant that this was all it could do for him under the Employment Standards Act. The complainant enlisted the assistance of his M.P.P. because he felt that there must be some way for him to obtain money that was rightfully his and which he had earned.

A review of the Employment Standards Act conducted during the investigation indicated that the Branch has the power to issue third party demands to garnishee money which has not been paid pursuant to an Order to Pay. It also became apparent that the certificate carried an incorrect name for the employer and had been filed in the wrong court because small claims courts outside of Metropolitan Toronto have no jurisdiction to collect amounts over \$1,000. This information was brought to the attention of the Ministry, which immediately issued a new certificate in the correct name of the employer, filed it in the correct court and issued third party demands under the appropriate section of the Employment Standards Act to garnishee the amount owing to the complainant.

A little more than a month later, the complainant had received his money. It had, however, taken more than sixteen months, and when the Deputy Minister of Labour was informed of the results of the investigation, he stated that the Ministry was prepared to offer the complainant a payment of \$350 in final settlement of all claims arising out of the Branch's handling of his complaint against his former employer.

The Employment Standards Branch has also, as a result of this complaint, established a special collections unit within the Branch which will result in more effective action being taken against recalcitrant and insolvent debtor-employers. In addition, the Ministry has taken steps to ensure that its officials are aware of the debt collection powers and remedies available under the Employment Standards Act and the general law.

In this case, the complainant was insistent over a period of some three years in attempting to obtain what was rightfully due to him and in questioning the position of the Branch. As a

result, he obtained not only his wages, which would otherwise have been lost, but compensation for the delay. His complaint resulted not only in a financial benefit to him, but a change in procedure within the Ministry's Employment Standards Branch which may well serve to prevent such unfortunate occurrences in the future.

On occasion, an amendment to a government regulation is necessary for a complainant to receive equitable treatment. In the following case, the Ombudsman was instrumental in changing an Ontario Regulation to resolve the complainant's grievance and thus benefit any complainant in similar circumstances in the future.

Case Summary 8

The complainant approached the Ombudsman in March, 1982 with a complaint about his deceased mother's benefits in the Municipal Employees Retirement System (OMERS). The Ombudsman initially delayed his investigation as the complainant's union was attempting to resolve the matter on his behalf. In August, 1982, the union advised that it was unable to take any further action and the Ombudsman duly began his investigation.

The complainant's mother was a municipal employee contributing to OMERS for eight and a half years before her death. Previously, in about 1956, she married the complainant's stepfather. About six years later, in 1961, he deserted her and was never heard of again.

In her first year of municipal employment, the complainant's mother completed an OMERS form designating the complainant as her beneficiary for the purpose of the regulations made under the Ontario Municipal Employees Retirement System Act. She made no reference to her husband.

After she died, the complainant sought to claim as beneficiary his mother's benefits in OMERS. OMERS, however, lacked the legal authority to pay him because in terms of its regulations the stepfather (as widower) had a prior claim. The stepfather, however, could not be located.

The problem was thoroughly discussed at a meeting attended by OMERS officers, the solicitor acting for OMERS and the Ombudsman's representatives. A solution was suggested and ultimately put into effect. On June 17, 1983, by Ontario Regulation 359/83, the OMERS regulations were amended to permit payment to someone in the position of the complainant when a person holding a prior claim (the stepfather here) cannot be found.

This enabled OMERS to pay the complainant and early in December, 1983 he duly received the sum of \$3,778.15 representing his mother's death benefits (\$4,197.94 with interest, less 10% tax). The complaint was therefore satisfactorily resolved.

Extensive legal research is often required for the Ombudsman to resolve a complaint. The process is illustrated in the following case, with the result that a governmental organization agreed to reconsider a law on which a decision was based, review its own legal powers and alter its practice of relying on a particular legal precedent. Part of this complaint was completely resolved on the initiative of the complainant's M.P.P.

Case Summary 9

The complainant had purchased a new home in which he subsequently discovered a number of defects. He contacted the Housing and Urban Development Association of Canada (HUDAC) and was advised that his only recourse was to take civil action against the builder or request conciliation under the Ontario New Home Warranty Program. Believing these to be his only two alternatives, the complainant chose the latter. Six months after his purchase, the complainant received the New Home Warranty Program warranty certificate from the vendor/builder. He discovered from the appeal procedures set out on the statutory warranty certificate that he could make a claim for compensation from the Guarantee Fund pursuant to section 14 of the Ontario New Home Warranties Plan Act. He wrote to HUDAC making this claim but received no reply. In the meantime, the conciliation process continued. Later, dissatisfied with the results of the conciliation, he again contacted HUDAC to make a claim for compensation. He was advised by HUDAC, and later by the Commercial Registration Appeal Tribunal

Locations of Private Hearings in Ontario



Statistical Information

COMPLAINT TO POPULATION RATIOS FOR NORTHERN AND SOUTHERN ONTARIO

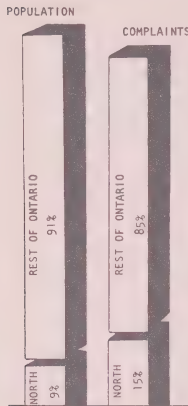


Fig. 1

NUMBER OF IN-PROGRESS FILES AT THE END OF FISCAL YEARS

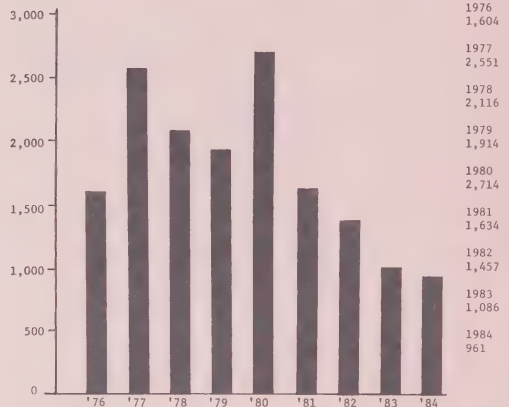


Fig. 2

COMPLAINTS AND INFORMATION REQUESTS CLOSED
FISCAL YEAR 1979/80 - 1983/84

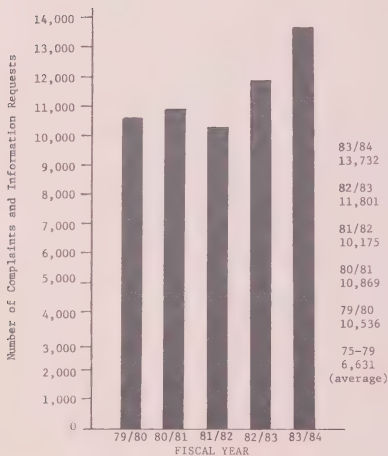
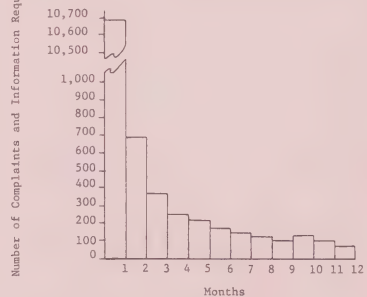


Fig. 3

COMPLAINTS AND INFORMATION REQUESTS
CLOSED BY MONTH CATEGORY



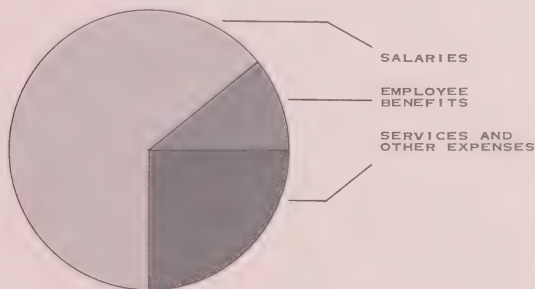
The above histogram which covers a period of 12 months accounts for 95.4 per cent of the 13,732 complaints and information requests closed by the Office between April 1, 1983 and March 31, 1984. A further 629 complaints required more than 12 months to close.

Fig. 4

FILES			* FAST ACTION COMPLAINTS (NO FILE OPENED)		
COMPLAINTS AND INFORMATION REQUESTS				NUMBER	%
			RESOLVED	141	1.4
			ABANDONED	739	7.5
			REFERRED/ADVISED/ EXPLANATION GIVEN	8,078	81.7
	NUMBER	%	WITHDRAWN	924	9.4
RESOLVED	1,488	38.6	TOTAL	9,882	100.0
ABANDONED	201	5.2			
CIRCUMSTANCES CHANGED	1	--			
INFORMATION REQUESTS	307	8.0	COMPLAINTS AND INFORMATION REQUESTS HANDLED AT HEARINGS		
NO SOLUTION IDENTIFIED	22	.6			
NON-JURISDICTIONAL	845	22.0			
RECOMMENDATIONS DENIED	25	.6		NUMBER	%
REFUSE TO INVESTIGATE	361	9.4	FAST ACTION COMPLAINTS	1,413	80.9
WITHDRAWN	600	15.6	FILES	333	19.1
TOTAL	3,850	100.0	TOTAL	1,746	100.0

* "Fast Action" is the term used to describe the method of quickly handling less complex complaints and information requests without formally opening a file.

Fig. 5



ACTUAL EXPENDITURES FOR THE FISCAL YEAR 1983-84

SALARIES	\$3,420,795		
EMPLOYEE BENEFITS	491,786	FURNITURE & OFFICE EQUIPMENT	19,039
TRAVEL & RELOCATION	137,507	OFFICE SUPPLIES & DEVICES	38,688
TELEPHONE, MAILING & DELIVERY	162,012	BOOKS & PUBLICATIONS	32,261
BUILDING RENT	511,181	OTHER SUPPLIES & EQUIPMENT	34,113
EQUIPMENT & OTHER RENTAL	149,774	TRANSFER PAYMENT TO THE INTERNATIONAL OMBUDSMAN INSTITUTE	20,000
PROFESSIONAL SERVICES	35,617		
OTHER SERVICES	139,508		
TOTAL	\$5,192,281		

COMPLAINTS & INFORMATION REQUESTS
BY ORGANIZATION

FISCAL YEAR 1983-84

ORGANIZATION COMPLAINED AGAINST	WITHIN JURIS- DICTION	OUTSIDE JURIS- DICTION	INFORMA- TION REQUESTS	TOTAL
AGRICULTURE & FOOD	37	12	10	59
ATTORNEY GENERAL	38	41	35	
ONTARIO MUNICIPAL BOARD	45	14	19	
PUBLIC TRUSTEE	31	5	8	
TOTAL ATTORNEY GENERAL	114	60	62	236
COLLEGES & UNIVERSITIES	79	13	22	114
COMMUNITY & SOCIAL SERVICES	195	101	74	
SOCIAL ASSISTANT REVIEW BOARD	58	11	10	
TOTAL COM. & SOC. SERVICES	253	112	84	449
CONSUMER & COMMERCIAL RELATIONS	158	40	124	322
CORRECTIONAL SERVICES	66	16	26	
CORRECTIONAL CENTRES	678	58	193	
DETENTION CENTRES	1,180	80	428	
JAILS	867	55	158	
TOTAL CORRECTIONAL SERVICES	2,791	209	805	3,805
CITIZENSHIP & CULTURE	9	2	2	13
EDUCATION	43	10	6	59
ENERGY	9		1	
ONTARIO HYDRO	50	12	10	
TOTAL ENERGY	59	12	11	82
ENVIRONMENT	51	6	10	67
GOVERNMENT SERVICES	36	4	16	56
HEALTH	128	17	25	
PSYCHIATRIC HOSPITALS	237	19	35	
O.H.I.P.	36	14	8	
TOTAL HEALTH	401	50	78	529
INDUSTRY & TRADE DEVELOPMENT	8		4	12
INTERGOVERNMENTAL AFFAIRS			2	2
LABOUR	82	25	29	
HUMAN RIGHTS COMMISSION	49	7	26	
WORKERS' COMPENSATION BOARD	754	512	229	
TOTAL LABOUR	885	544	284	1,713
MUNICIPAL AFFAIRS & HOUSING	124	30	50	204
NATURAL RESOURCES	129	19	29	177
NORTHERN AFFAIRS	3		2	5
REVENUE	92	42	33	167
SOLICITOR GENERAL	54	17	30	101
TOURISM & RECREATION	13	1	3	17
TRANSPORTATION & COMMUNICATIONS	171	51	60	282
TREASURY & ECONOMICS	12	1	2	15
ONTARIO GOVERNMENT OTHER	41	24	464	529
ONTARIO GOVERNMENT TOTAL	5,563	1,259	2,193	9,015
COURTS		323	34	357
FEDERAL		730	157	887
PRIVATE		2,167	503	2,670
MUNICIPAL		720	76	796
INTERNATIONAL		6	4	10
OTHER PROVINCES		30	17	47
NO ORGANIZATION SPECIFIED		20	41	61
<u>TOTAL</u>	<u>5,563</u>	<u>5,255</u>	<u>3,025</u>	<u>13,843*</u>

*NOTE: This figure exceeds the number of closed complaints (13,732) because some complaints involved more than one organization.

(CRAT), that since he had proceeded with conciliation, his only recourse would be to arbitration and that he could not now make a claim for compensation from the Guarantee Fund.

The complainant persisted and subsequently CRAT held a preliminary meeting to hear submissions regarding its jurisdiction. The outcome was that CRAT determined it had no jurisdiction and no formal hearing was held under section 16 of the Act.

While the Ombudsman investigated the position taken by CRAT, the complainant pursued his complaints with respect to HUDAC through his M.P.P. and was successful in obtaining a \$5,000 cash settlement from HUDAC.

As a result of his investigation, the Ombudsman tentatively concluded, pursuant to section 22(1)(d) of the Ombudsman Act, that CRAT was wrong in deciding that it had no jurisdiction over the complainant's appeal and further that, pursuant to section 22(1)(b), CRAT was unreasonable in declining to hold a full hearing as provided by section 16 of the Ontario New Home Warranties Plan Act.

In support of his conclusion, the Ombudsman reviewed the relevant legislation as well as the precedent relied upon by the CRAT in holding that it had no jurisdiction in the complainant's case.

By section 11 of the Ontario New Home Warranties Plan Act, the Ontario New Home Warranty Plan is established and consists of two schemes for consumer protection.

The first, in section 13, sets out statutory warranties implicit in the purchase of a new home. The second, in section 14, provides for compensation to be paid out of a Guarantee Fund if a purchaser comes within one of the situations described in section 14(1). Limits on the amount to be paid are set out by regulation. Section 17 of the Act provides a further remedy for the consumer. It provides that the corporation designated to administer the Act (HUDAC) may "upon the request of an owner, conciliate any dispute between the owner and the vendor".

It was noted that under section 17, the ultimate redress, should an owner be successful, comes directly from the vendor/builder, whereas under section 14, a successful owner will be compensated from monies in the Guarantee Fund administered by the Program (HUDAC). This

distinction between the remedies set out in section 14 and section 17 is crucial where, as in the complainant's case, the vendor is no longer in business. In such cases, section 17 is not a practical remedy and would not likely be exercised by an informed owner. There was nothing in the legislation to indicate that section 14 and section 17 were mutually exclusive remedies. Thus, the position taken by CRAT did not find support in the legislation.

The Ombudsman also noted that the decision in the case of Gracien St. Onge and The Corporation Designated ... (HUDAC), 1979 8 C.R.A.T. 81, was not a useful precedent in the complainant's case as Mr. St. Onge had attempted to appeal to CRAT HUDAC's conciliation decision under section 17, while the complainant in this case was requesting a review of HUDAC's decision that his was not a section 14 claim. Under the Act, such decisions are clearly reviewable by CRAT by virtue of section 16.

Further, in this case, the complainant alleged he was not fully advised of his rights under the Act. Section 17 is to operate only at the request of an owner and he contended he would not have proceeded with conciliation had he been aware of his right to make application pursuant to section 14.

The Ombudsman tentatively recommended: pursuant to section 22(3)(e) of the Ombudsman Act, that CRAT reconsider the law on which its decision was based; pursuant to section 22(3)(g), that CRAT review the powers given to it and to HUDAC under the Ontario New Home Warranties Plan Act; and, pursuant to section 22(3)(d), that CRAT alter its practice of relying on the St. Onge decision where conciliation has occurred and consider each case on its particular merits.

The Chairman of CRAT responded to the Ombudsman indicating that CRAT was prepared to accept the tentative recommendations and assured the Ombudsman that the recommendations would be circulated to the members of the Tribunal for consideration in the future when similar issues arose.

In the following case, the Ombudsman suggested that an amendment be made to the Health Disciplines Act to clarify the right of any person affected by an Order of the Board

to institute proceedings in the Supreme Court to enforce the Order.

Case Summary 10

This complainant contacted our Office to complain about a decision of the Ministry of Health not to take steps to ensure the enforcement of an order of the Health Disciplines Board which related to the treatment of the complainant's deceased husband by an attending physician. It appeared that the Minister was of the view that, since the Board had apparently exceeded its jurisdiction in making the order, it could neither enforce its decision nor reconsider it. Thus, it was believed that nothing could be done.

Our investigation revealed the following. The complainant's husband died of cardiac arrest in an Ontario hospital in the fall of 1979. The complainant was dissatisfied with the quality of medical care received by her husband and complained to the College of Physicians and Surgeons of Ontario. The College reviewed the case and concluded that there was no evidence of substandard care. The complainant applied to the Health Disciplines Board for a review of this conclusion. The Board ordered the Complaints Committee to investigate and report on this matter, and, as a result of the Committee's report, found that the doctor's actions, while not contributing to the death of the complainant's husband, fell short of good medical practice. Hence, it ordered the Committee to direct the doctor to attend at its offices "to receive a severe admonishment".

The College of Physicians and Surgeons took the position that the order amounted to the imposition of discipline on the doctor and was therefore not within the Complaints Committee's jurisdiction. Hence, it refused to direct the Committee to carry out the order.

Negotiations between the Board and the College on this issue resulted in an agreement "to establish in the public interest an effective working relationship between the Ontario College of Physicians and Surgeons and the Health Disciplines Board".

Subsequently, the complainant consulted staff at the Patients' Rights Association and, through the Association, contacted the Minister of Health with her complaint and asked him to intervene. The Minister responded that, since the

Board had exceeded its jurisdiction, it now had no authority to enforce or change its decision. The Minister stated that he hoped that the agreement reached between the Board and the College would prevent similar problems from arising in the future.

As a result of our investigation, the Ombudsman came to the possible conclusion that the decision of the Minister of Health that the order of the Health Disciplines Board was made in excess of jurisdiction was wrong. Based on this conclusion, we decided that we might be prepared to make two recommendations, outlined as follows:

1. The Health Disciplines Board ought to take all steps available to it to see that its order in the complainant's case is obeyed, including, if necessary, a request to the Minister of Health for an amendment to the Health Disciplines Act.
2. The Minister of Health ought to reconsider the position he has taken in response to the complaint submitted to him on the complainant's behalf by the Patients' Rights Association.

We reported our possible conclusion and recommendation to the Deputy Minister. Also, because we were of the opinion that they might be "adversely affected" by our possible conclusion and recommendations, we notified other colleges subject to the Health Disciplines Act, the Health Disciplines Board, and the affected physician. Representations were received on behalf of all the parties.

The Minister of Health, in responding to our letter, pointed out that whether or not the words "severe admonishment" were generally available for inclusion in an order of the Board, in the complainant's case they were used to express a disciplinary intent. Many other responses to our letter expressed a similar opinion. While the legality of the order remains a question of some difficulty, we decided that the order could have been interpreted as disciplinary in nature and therefore beyond the jurisdiction of the Complaints Committee. In any case, we were persuaded that the physician in question had been adequately admonished by the attention the matter had received, and decided not to recommend any further action be taken against

him. As a result, we did not find this complaint to be supported.

However, regarding the issue of the enforcement of orders of the Health Disciplines Board, most of the respondents to our letter were of the opinion that the Board could enforce its own order through an application to the Divisional Court under the Judicial Review Procedure Act. Nevertheless, in our view, this may still leave a person in our complainant's position with no recourse. Hence, we suggested that an amendment be made to the Health Disciplines Act to clarify the right of any person affected by an order of the Board to institute proceedings in the Supreme Court to enforce the order. We advised the complainant, the Ministry of Health and the affected parties of our conclusions.

The following case pertains to the rights of an involuntary patient in a mental health centre. As a result of the investigation, the Ombudsman recommended to the Ministry of Health that it review provisions of the Mental Health Act with respect to Treatment Orders.

Case Summary 11

A young woman who was an involuntary patient in a mental health centre complained that she had been unreasonably placed in body restraints on two occasions without her consent, when there was no Order to Treat her without her consent. She also complained about the Order to Treat eventually issued by the Regional Review Board.

Our investigation determined that on two occasions the patient was threatened with full-body restraints unless she complied with minor ward rules: wearing socks, and not sleeping on the couch in the ward lounge. Each time she reacted by becoming verbally and physically abusive toward staff, and was then placed in restraints. She had not consented to a treatment plan which included the use of body restraints, nor was there a treatment order.

The Ombudsman accepted that after the complainant became assaultive, the Mental Health Act authorized the use of restraints. However, the Act contemplates as minimal a use of restraints or force as is reasonable. In this case, the patient was threatened with full body

restraints for refusing to put on her socks and for not getting up off a couch.

The Ombudsman concluded that while the actual use of restraints had been justified, the threat of using restraints to make a patient conform to ordinary hospital rules was unreasonable, unjust and oppressive in the absence of consent or a Treatment Order. He recommended that the practice of using the threat of restraints to make patients conform to ordinary hospital rules be altered. The administrator of the mental health centre agreed to implement this recommendation.

With respect to the Treatment Order, the complainant objected that it contained no time limit, and did not specify what types of treatment could be given under the general heading of behaviour modification and psychotherapy. Our investigation revealed that the Mental Health Act makes no provision for the automatic review of treatment orders, nor does it provide for patients to apply to have orders varied or rescinded. The chairman of the Regional Review Board argued that it is not the board's function to initiate or supervise treatment. The board presumes that authorized treatment will be administered professionally and for the sole benefit of the patient. It would have been difficult for the board to stipulate a time limit for the treatment. Rather, the board believes that a physician will end the treatment when it has run its course and the patient has been cured, or it has ceased to be effective.

The Ombudsman concluded that the board's order was in accordance with a provision of the Mental Health Act that is unreasonable, unjust and oppressive in that it does not require time limits on orders, nor does it provide any procedure for automatic review of orders or for patient applications to vary or rescind them. He recommended that in future the review board request that treatment plans be submitted with applications for orders, and that the orders should include copies of the treatment plans. He also recommended that the Ministry of Health review the Mental Health Act with a view to considering placing time limits on Treatment Orders, thereby providing for automatic reviews and/or a procedure whereby the patient may apply to have the order varied or rescinded.

The Deputy Minister of Health replied that procedures for the Regional Review Board were under review. Some time later, he wrote again to say that after a meeting of the five Regional

Review Board Chairmen, it was agreed that treatment orders should be specific, time-limited, and accompanied by treatment plans.

In the following case, the Ombudsman's investigation was instrumental in improving examination procedures used by the Board of Directors of Chiropractic.

Case Summary 12

This investigation dealt with a number of complaints by an individual who had received his degree of Doctor of Chiropractic from an American facility recognized in Ontario, but had been unable to obtain his licence entitling him to practice in Ontario. He had attempted the licensing examinations on three separate occasions but had failed to obtain passing grades on some of the exams set by the Canadian Chiropractic Examining Board (CCEB). He then wrote to the Board of Directors of Chiropractic (the Board), the Ontario licensing authority, to request that it review with him all of his examination papers to determine the validity of the marks assigned, and to enable him to understand his past incorrect responses, thereby assisting him to improve his future grades. The Board refused.

The complainant was of the view that this refusal was unreasonable. He stated that the Board was a supervisory and licensing body which had the job of ensuring that the examinations administered by the CCEB meet its standards. He contended that the Board had therefore failed to properly ensure that the CCEB was exercising its statutory duty in a fair and responsible manner.

The Board was of the opinion that the CCEB examinations had been fair, and that the marks had not been arbitrarily awarded. With respect to its statutory duty, the Board was of the view that it had no control over the examinations conducted by the CCEB.

During our investigation we conducted a review of the relevant legislation, the Drugless Practitioners Act and Regulation 248 thereunder. Section 17(1) of the Regulation states that:

The Board shall prescribe examinations for the admission of chiropractors to practice in Ontario upon the subjects prescribed by subsection 2.

Subsection 2 lists nine subjects for examination. Section 18(1) of the Regulation states:

The Board shall conduct or cause to be conducted examinations at least once a year.

In the Ombudsman's opinion the examinations referred to in sections 17(1), (2) and 18(1) are the same examinations. The Regulation permits the Board to have the option of either conducting its own examinations or causing those examinations to be conducted by another party. At issue in this complaint was whether it could be said that by requiring licensing applicants to write the CCEB examinations, the Board was causing examinations to be conducted by another party. Our investigation showed that CCEB conducted its own examinations on a yearly basis as part of its mandate, not at the instance of the Board.

The Ombudsman formed the opinion that it was open to him to conclude that the actions of the Board in requiring applicants for licensing to write the CCEB examinations, which were being conducted as part of the CCEB's mandate, would appear to be contrary to law. It appeared to the Ombudsman that two possible alternative recommendations could be made. It would be open to him to recommend that the Board seek an amendment to section 18(1) of Regulation 248 permitting it to cause examinations to be conducted by the CCEB. The Board subsequently agreed to this.

The Ombudsman also considered the issue of the complainant being allowed to review his marked examination papers. It did not seem to him that there was any good reason why the Board could not accommodate the complainant, or any other applicant, in this way. It appeared that an applicant who saw the marked examination papers would be satisfied that they had been fairly assessed and would be better able to prepare for the rewriting of the examinations in the future. In the complainant's case, however, the Board never had physical possession of the examination papers. If the Regulation were amended, however, that amendment would provide the Board with the power or authority to either review marked examination papers with students, or cause the examiners to review papers with students.

It therefore appeared open to the Ombudsman to conclude that the Board's practice not to assist applicants to review the examination papers of the CCEB was unreasonable. It also

appeared open to the Ombudsman to recommend that the Board alter its practice to assist and permit applicants to review their marked examination papers with the appropriate examiner.

As required by section 19(3) of the Ombudsman Act, the Ombudsman reported his tentative conclusions and recommendations to the Chairman of the Board. Written and oral representations were received from the Chairman and Executive Secretary of the Board.

With respect to the drafting of an amendment to Regulation 248, representatives of the Board recently met with Ministry of Health officials and were assured that the proposed revision of the Regulation permitting the Board to either conduct the examinations itself, or cause the exams to be conducted by the CCEB or any similar or successor agencies, would be actioned as expeditiously as possible.

Concerning the issue of students reviewing marked examination papers, the Board confirmed that in future any examination candidate would have the opportunity to take advantage of a procedure which would entitle them to review marked, failed examination papers.

In the end result, although the Ombudsman supported the complaint, he chose not to make any final recommendations because of the planned actions on the part of the Board of Directors of Chiropractic.

In the following case, the Ombudsman was instrumental in advancing the eligibility date of the Ministry of Health's Drug Benefit Plan for senior citizens.

Case Summary 13

This complainant wrote to our Office after determining that her benefits under the Ministry of Health's Drug Benefit Plan would not commence until the second month following her 65th birthday. The complainant's group health coverage under her late husband's employer ceased on her birthday, thereby leaving a two-month gap when she would not be eligible for benefits.

In its response to the Ombudsman, the Ministry referred to what is now Regulation 318, section 25(1) of the Family Benefits Act which specifies that drug benefit coverage is provided for Ontario residents who are eligible for a pension under Part I of the Old Age Security Act (Canada), effective the month following the month in which the person receives payment of a monthly pension from the Federal government. The Ombudsman was advised that the two months' delay in the commencement of drug benefits was necessary because of the Ontario government's use of the federal computer listing, which was only made up the month after the month in which the individual turned 65.

Our investigation revealed that ministerial approval was automatically granted for the commencement of coverage in the month following receipt of either an application submitted by an eligible individual, or the month immediately following receipt of the last maintenance/supplement cheque by eligible Ontario residents. Senior citizens who were not recipients of maintenance/supplement cheques and who did not complain to the Ministry of Health were the only individuals who had an extra month's delay before the commencement of drug benefits after their 65th birthday.

The investigation also revealed that the pamphlet issued by the Ministry of Health entitled "Ontario's Drug Benefits for Senior Citizens" did not clearly state that it would be open to individuals who had been resident of Ontario for twelve months immediately prior to their 65th birthday to complete an application form for the program, thereby resulting in the commencement of benefits one month earlier (i.e., the month following their birthday). Also, this pamphlet did not clearly state that drug coverage was not effective immediately upon turning 65.

At this stage of the investigation the Ombudsman formed the tentative opinion that the establishment of eligibility dates for recipients of benefits under the Drug Benefit Plan was in accordance with a Regulation that might be improperly discriminatory and that the omissions in the pamphlet were unreasonable. The Ombudsman was of the view that it was open to him to make two recommendations. The first was that Regulation 318 should be amended to specify that all persons who have attained the age of 65 should become eligible for the Drug Benefit Plan at the same time, i.e. the month following their 65th birthday and also that the omissions in the pamphlet should be rectified.

As required by section 19(3) of the Ombudsman Act, the Ombudsman reported his tentative conclusions and recommendations to the Deputy Minister of Health. With respect to the matter of the effective date, the initial written representations received from the Ministry did not, in the Ombudsman's view, speak to his tentative conclusions and recommendations. It was therefore necessary for the Ombudsman to restate his position.

In the end result the Ministry advised that it had reexamined the issue of different dates for the commencement of coverage under the Drug Benefit Plan for senior citizens and had arrived at a resolution. All senior citizens qualifying for drug benefits would become eligible on the first of the month following their 65th birthday. The implementation of the change was complicated and the Ministry advised that it would be delayed for a few months pending coordination between the Ministries of Health and Community and Social Services, and the Department of National Health and Welfare. In addition, changes were necessary in the Ministry of Health's computer and administrative processes.

With respect to the Ombudsman's possible recommendation concerning omissions in the pamphlet, we were advised that a revised pamphlet had been released which rectified the omissions specified in the Ombudsman's letter to the Ministry.

Although it remained the Ombudsman's view that eligibility dates for recipients of benefits under the Drug Benefit Plan were in accordance with a Regulation that may be improperly discriminatory, at the conclusion of the investigation the Ombudsman felt that it was unnecessary for him to make a recommendation in view of the Ministry's planned action. Further, as the omissions in the pamphlet were rectified, the Ombudsman also felt that a recommendation on this issue was unnecessary.

The following case illustrates that an investigation conducted by the Ombudsman can often become a mediation process whereby a complaint is resolved.

Case Summary 14

This complainant, the Chairman of a leaseholders' association representing 97

leaseholders on 13 different lakes in northwestern Ontario, alleged that the Ministry of Natural Resources had acted unreasonably in relying upon an appraisal completed by an independent appraiser it had retained in determining the value of Crown cottage lots the members had the option of purchasing.

As of 1971, the Ministry began leasing, as opposed to selling, Crown cottage lots. Each lease was for a thirty-year term renewable for two further ten-year terms. The annual rent was subject to adjustment every ten years. The Ministry policy was to set the annual rent at 10% of the appraised market value of the lot in 1971; in 1981 and 1991 the rent would be adjusted for the next ten-year period to reflect the appraised market value of the lots in those years.

The February 21, 1978 Speech from the Throne promised a program to sell Crown cottage lots, and the Regulations made under the Public Lands Act were amended accordingly.

The Ministry implemented the conversion program of leasehold to freehold tenure by having each of the 2,100 Crown cottage lots affected in the province appraised by the Ministry of Government Services. The lessees could either purchase the lots at appraised market value or continue to lease for the remaining 43 years of the lease, under the terms of the original lease.

In February of 1980, the Minister of Natural Resources announced that the lots would be sold at their current market values less all rent paid by the lessees to the date of purchase. If a lessee was dissatisfied with the appraised value established by the Ministry of Government Services, he could obtain a second appraisal for which the Ministry of Natural Resources would pay one-half of the cost. If agreement still could not be reached, the Ministry could order, and pay for, a third appraisal and the Ministry would use all three appraisals as the basis for further negotiations with the purchaser.

For purposes of simplicity, this summary will deal with the appraisals of the nine cottage lots on one of the 13 lakes.

In 1979, the Ministry of Government Services valued the nine cottage lots at \$12,000 each. The leaseholders were dissatisfied with the appraisal and had a second appraisal done by an appraiser of their choice. This appraiser valued

two of the lots at \$6,500, four at \$7,000 and three at \$7,500. Because of the wide spread between the appraisals done by the Ministry of Government Services and the independent appraiser, the Ministry hired an independent appraiser to do a third appraisal and to review the appraisals already completed. He appraised lots 1 to 7, inclusive, at \$12,500 each and lots 8 and 9 at \$13,900 each.

The Ministry offered to sell the nine Crown cottage lots at the appraised market value estimated by its independent appraiser less any rent paid during the time of the lease. Each of the leaseholders purchased their lots; however, they did so under protest as it was their opinion that the purchase price was too high. The Ministry made a downward adjustment of the appraised values of the lots and offered to sell the lots to the leaseholders for that amount. The Association offered a total of \$1,004,300 for the 97 lots. The Minister responded and made a final offer of \$1,052,800, or \$500 more per lot than that offered by the Association.

As a result of this Office's involvement, the Association offered, and the Ministry accepted, \$1,028,550 for the 97 lots, or \$250 per lot more than the Association had offered the Ministry and \$250 less per lot than the Ministry's counter offer. The Ministry agreed to the Association's suggestion that the \$250 per lot reduction take the form of \$125 deductions on each of the last two payments, for those paying on the four-year instalment plan, and a refund of \$250, without interest, for those who had paid for their lots in full.

The disabled have special needs. In the following case, the Ombudsman's involvement assisted a paraplegic student to have a mechanical lifting device installed at his school. Hopefully this precedent will be followed by all local school boards.

Case Summary 15

The complainant objected to the action taken by the Ministry of Education in not requiring a local school board to install an elevator in the school to assist her handicapped son so he need not climb the stairs.

The complainant's son has paraplegia in his legs and must use a wheelchair. It is very difficult, tiring and hazardous for him to climb stairs. His doctors indicated a fall could have resulted in complete and irreversible paralysis. The school that this boy wanted to attend has two levels, with no elevator. When presented with a request to assist this student, the school board refused to install an elevator in that school, although it had been pointed out to the board by the complainant's M.P.P. that a substantial portion of the cost of purchasing and installing an elevator could be subsidized by a grant from the Ministry of Education. The complainant told us that there were other types of mechanical lifting devices which were less expensive and more practical than an elevator for transporting the physically handicapped up and down stairs, and that she would be satisfied with such a device. The Ministry advised it was supportive of the student's special needs and undertook to discuss it with the school board.

The Minister later advised our Office that the School Board decided to purchase a mechanical lifting device which would be less costly than an elevator and more practical for transporting physically handicapped students up and down the stairs of that school. Furthermore, the school was going to make an application to the Ministry for a grant to finance the cost of purchasing and installing this device and the Ministry intended to agree to this application. Our Office was later informed by the Ministry that other school boards in the province are anxious to purchase the same device.

The Ombudsman's Office is intended to be the "last resort" for the aggrieved citizen. The following case illustrates the Ombudsman's effectiveness when the time limits for proceeding with other actions have expired.

Case Summary 16

The complainant had owned several tourist businesses at a river crossing on a highway. In 1964, the highway was upgraded; the crossing relocated downstream; and the old bridge removed. The complainant's operations were now at the end of an eight mile dead-end road and so he was forced to close his businesses. The land

adjacent to the new crossing was owned by the Ministry of Natural Resources (MNR). The complainant negotiated with MNR to lease land on which to rebuild his operations. Prior to the signing of a lease, the complainant was required to obtain an access permit from the Ministry of Transportation and Communications (MTC) to allow access from the new highway to the site he proposed to lease. MTC refused to grant such a permit as this section of the highway had been designated as a controlled access highway. The complaint to this Office was that MTC should allow the access permit.

Our investigation revealed that a Ministry Survey filed at the local Land Titles Office in 1962 had shown the highway to be a controlled access highway. Such designation generally precludes private commercial access. MTC appeared to have good reason for so designating this portion of the new highway.

However, it was clear that the complainant had suffered a financial loss due to the relocation. The time limitation for proceeding with an action for injurious affection against MTC had passed, but the complainant seemed to have had a cause of action in 1964. This right of action had lapsed during his negotiations with MNR.

The Ombudsman wrote to the Deputy Minister of MTC, pursuant to section 19(3) of the Ombudsman Act, advising that he might recommend that MTC negotiate a settlement for the injurious affection and subsequent expenses incurred in attempting to resolve the matter. In response, the Deputy Minister agreed to examine the complainant's claim for injurious affection and recommend appropriate payment.

The Deputy Minister argued, however, that the expenses incurred by the complainant in negotiations with MNR should not be reimbursed by his Ministry. He characterized these expenses as "speculatively incurred ... for his private gain". The complainant maintained that he should be compensated for these expenses.

On reconsideration, the Ombudsman felt that the complainant had ample opportunity to know, prior to his negotiations with MNR, of the restrictions attached to the highway. The costs incurred in his negotiations with MNR were, therefore, speculative. The Ombudsman concluded that MTC was not acting improperly in declining to consider compensating the complainant for these costs.

WORKERS' COMPENSATION BOARD

DISABLEMENT:

Workers' compensation is normally associated with traumatic accidents on the job, like falling off a ladder or being hit by a piece of falling debris; however, the Workers' Compensation Act also protects workers who suffer disabilities which arise out of and in the course of their employment in the absence of a specific accident. These "disablement" cases form a significant portion of the complaints registered with the Ombudsman. They are often difficult cases to resolve because the onset of symptoms is gradual; medical science is only now evolving in this area and there may be several factors, work-related and non-work-related, contributing to the disability.

Case Summary 17

An auto worker's assembly line job required a great deal of bending and twisting. He began to experience back problems in 1978 and eventually underwent surgery in 1981.

In 1981, he claimed benefits from the Workers' Compensation Board for his lost time necessitated by his surgery. The worker's family doctor and two orthopaedic surgeons supported his claim that his work contributed to his disability. A physician employed by the Board also supported a relationship. The claim was, however, rejected by the Board because its surgical consultant was unaware of any claims that had been allowed where no heavy lifting was involved.

Following rejection of his claim, the worker approached the Ombudsman. Several unsuccessful informal attempts were made at bringing the information to the Board's attention in an effort to resolve the complaint. Having regard for the nature of the work and the overwhelming medical evidence in support of the complaint, a tentative recommendation was made by the Ombudsman that the Appeal Board revoke its decision and allow the claim.

Before responding to the tentative recommendation, the Board advised us of its

opinion that there was a conflict of medical opinion between the orthopaedic surgeon and the Board's surgical consultant. Hoping to resolve the apparent conflict, the Board referred the matter to an independent medical specialist.

After receiving the opinion of an independent specialist some three months later, the Board advised us that there was a preponderance of medical evidence in support of a causal relationship. The Board then revoked its 1982 decision and granted the claimant entitlement to benefits in 1984.

The complainant was very pleased with the results of our investigation.

Case Summary 18

In 1977, the complainant laid off work because of hand, arm and shoulder problems. She attributed the disability to the repetitive nature of her work as a hand sewer, as well as the slightly bent over, neck-flexed position that she was required to adopt during the course of her work.

She claimed benefits from the Workers' Compensation Board and although the claim was initially allowed, the decision was overturned by the Appeal Board.

After a review of the documentation submitted by the Board and the complainant, the Ombudsman tentatively concluded that the nature of the work and the medical evidence supported the worker's contention. A tentative recommendation was made by the Ombudsman that the Appeal Board revoke its decision and allow the claim.

On November 22, 1983, the Chairman of the Workers' Compensation Board advised this office that the Appeal Board had carefully studied the information submitted by the Ombudsman, as well as further information received from the accident employer, and decided that a relationship existed between the repetitive movements required by the worker's job and the development of her symptoms. The Board then revoked its 1979 decision and granted the claimant entitlement to benefits in 1984.

The complainant, who was then residing in Italy, was advised of the Ombudsman's successful resolution of her complaint. She would have benefits coming to her for the period that she was totally disabled as a result of her condition, and, as well, the Workers' Compensation Board advised this office that arrangements would be made through its agreement with the Italian government to have the complainant examined for a permanent disability rating in Italy.

MEDICAL REFERRAL:

In many Workers' Compensation Board decisions the medical evidence is the crucial factor. In some of the cases the Ombudsman is asked to investigate, the medical evidence is conflicting or inconclusive. To resolve these complaints we attempt to clarify the opinions by writing to the doctors who have treated the injured worker or engaging an independent specialist in the appropriate field of medicine. In some cases, the additional evidence supports the worker's contention and in other cases the new evidence confirms the decision reached by the Board. In all cases, the worker who has come to the Office has the knowledge that the crucial medical issues have been fully considered.

Case Summary 19

This complainant suffered a serious injury to his low back in 1972 when he fell off a conveyor belt he was attempting to repair. Despite a variety of treatments, his pain and restriction of movement grew progressively worse over the years.

Initially, the Workers' Compensation Board granted him a 35% pension for his back disability. In 1979, upon reexamination, his pension was increased to 45%, and later to 50%. The examining Board doctors noted in their reports that there was a very marked organic disability.

The complainant was of the opinion that the 50% award did not fully compensate him for the disability. He claimed that he was completely disabled with severe back pain, which repeated attempts at treatment had failed to alleviate. The

Appeal Board heard his claim and ordered that further medical evidence be obtained. On the basis of this evidence, it ordered a 60% award.

The complainant thereupon registered his complaint with the Ombudsman, again claiming that he was 100% disabled. The Ombudsman's investigation showed that the complainant's doctors, particularly his specialists, had provided the Board with fairly strong evidence to the effect that the complainant was substantially disabled by his condition, and that it was unlikely he would return to work. A further opinion was obtained by the Ombudsman from the neurosurgeon treating the complainant. This report was very supportive of the complainant's position and indicated that the complainant was unable to perform even light work without exacerbating his problems and causing possible deterioration. This report was forwarded to the Board for consideration as new evidence. Upon review of the claim, the Appeal Board agreed with the medical opinion submitted by the Ombudsman, and granted the complainant 100% permanent disability benefits, including a retroactive award to December 1, 1981.

Case Summary 20

A worker in the bush of Northern Ontario experienced the release of a blood clot in his right leg while swinging a sledgehammer during the course of his employment. The worker was taken by car to the nearest hospital and subsequently transferred by air ambulance to a hospital in Thunder Bay. Surgery was performed some six hours after the initial onset of pain, but the worker eventually lost his leg above the knee due to the lack of circulation for an extended period of time. The Workers' Compensation Board determined that the cause of the blood clot was pre-existing, and that the action of swinging the sledgehammer did not trigger this incident which ultimately led to the worker's losing his right leg. Our Office sought an opinion from a specialist in the field of vascular surgery, who indicated that while the condition was pre-existing, it could be concluded that the stress of swinging the sledgehammer could cause the clot to begin moving and ultimately block circulation.

This report was submitted to the Appeal Board and after reviewing the report, the Board concluded that the worker did sustain personal injury by accident arising out of and in the course of his employment. The worker is now in receipt of

temporary total disability benefits dating back to the time of the accident and, as of the end of February 1984, he has received in excess of \$28,000.

Case Summary 21

In this case, the individual came to our Office because the Board had denied that his present back problems were related to industrial accidents of 1957, 1966 or 1975. To complicate matters, the man had moved to Alberta in 1978 and sustained an injury there. The Alberta Workers' Compensation Board closed his claim in 1979, ruling any ongoing problems were related to his Ontario accidents. The Ontario Board determined in the absence of medical evidence of continuing problems between 1975 and 1978 that the current disability was related to his accident in Alberta.

During the course of our Office's involvement, the investigator obtained chiropractic reports indicating that the man had received regular treatments for his back between 1975 and 1978 in Ontario. These reports were forwarded to the Ontario Board, which then reopened the case and eventually allowed the claim for an ongoing back disability.

As a footnote, the claim was allowed in November of 1983. After receiving an inquiry from the complainant, we pursued the matter with the Board and were advised the payment had eventually been processed in March, 1984.

PSYCHIATRIC DISABILITIES:

Industrial accidents cause psychological disabilities as well as physical injuries. The Ontario Workers' Compensation Board has recognized psychological disabilities for many years. The Ombudsman is often asked to investigate decisions concerning the degree, duration and existence of psychological disabilities. Psychiatric opinions as well as information about the worker's previous work and social history are important factors the Ombudsman must consider during these investigations.

On November 20, 1968, the then 28-year-old complainant wrenched his back while working on a furnace. Treatment was conservative initially; however, he underwent back surgery in March 1969 and again in October 1970. The complainant received a 30% permanent disability award for his residual low back disability. This pension was subsequently increased to 60%.

In June 1975, the complainant was granted a 20%, one-year lump sum award for his psychiatric disability. This award expired in June 1976. Although a Board physician estimated in October 1976 that the complainant was 50% disabled on a psychiatric basis, the Board's Adjudication Branch did not act upon the doctor's comments.

In January 1983, the Ombudsman wrote to the Chairman of the Workers' Compensation Board, outlined the results of our preliminary investigation, and made a tentative recommendation that the Board revoke its decision and grant the complainant ongoing entitlement for his psychiatric disability.

In May 1983, our office was advised that the Appeal Board had reconsidered the matter and granted the complainant an additional award of 25%, on a provisional basis for three years, in recognition of his residual psychiatric disability. In addition, this award was paid retroactively to June 1976. That decision satisfactorily resolved the complaint.

SECTION 8(11) AND 8(10):

When a worker is injured in the course of his employment, he is eligible for benefits from the Workers' Compensation Board, but is prohibited from taking legal action against his employer. The exception to this rule occurs when a third party, someone other than the worker and the employer, is involved in the accident (for example, motor vehicle accidents). In these cases, the worker may be able either to collect Workers' Compensation Board benefits or to sue the driver or owner of the other vehicle.

Case Summary 22

A worker involved in a car accident was notified by the Board of his possible options. After consulting his lawyer, he decided to take legal action against the leasing company which owned the other vehicle. Shortly before the court date, the leasing company approached the Board to determine if the worker had the right to sue. (It is the responsibility of the Board to make this determination.) The Board determined that the worker did have the right to sue, but the Board, at the instruction of the court in a previous case, also ruled that the worker had no right to recover damages. The worker was eventually granted benefits under the Workers' Compensation Act.

When confronted with this anomaly, being granted the right to sue but being denied the right to recover damages, the worker registered a complaint against the Board's decision with our Office. Following an extensive review of the legislation and several court decisions, we determined that the decision of the Board was not unreasonable. The Board had interpreted the law in accordance with numerous court decisions and made its findings in accordance with a direction from the courts.

We, however, were of the opinion that this anomaly should be corrected. During our investigation, correspondence from a previous Minister of Labour came to our attention wherein he acknowledged the need to clarify the legislation. We suggested to the current Minister of Labour that this would be a good time to correct the anomaly. The Minister has referred the matter to his legal department for consideration of

the proposed amendments. Unfortunately, any future changes to the legislation would not have retroactive implications and therefore would not be of benefit to the complainant. However, it is hoped that the implementation of this suggestion will benefit workers involved in similar situations in the future.

ENTITLEMENT FOR SPOUSE:

The dependent spouse of a worker who has died may be entitled to benefits from the Workers' Compensation Board if the industrial disease was a significant factor in his death.

Case Summary 23

A miner, who had worked for 33 years in the gold mines of northern Ontario, retired and several years later developed silicosis. His claim was accepted by the Board and at the time of his death he was receiving a 50% pension. His widow then applied to the Board for dependent's benefits. Subsequently, the Board denied her request because it had determined that her husband's death was caused by his heart condition, and not by silicosis.

The matter was complicated somewhat by the fact that the attending cardiologist, who had stated that the man's death was as a result of his silicotic condition, was no longer in Canada, and it was not possible for us to clarify the basis of his opinion.

We asked a leading physician in respiratory diseases to provide us with an expert opinion on the cause of death. The independent specialist wrote a report which noted that the worker's heart at the time of death showed changes that could be attributed only to left-sided heart failure, and did not reveal changes which would have been consistent with silicosis. The specialist was unable to state that silicosis significantly contributed to the cause of death, heart failure. Therefore the widow's claim was not substantiated, but she expressed her appreciation that the matter had been reviewed by a leading medical expert.

An obstacle frequently encountered by the Ombudsman in the course of an investigation is the length of time that has elapsed between the accident and our involvement.

Case Summary 24

At 1:26 a.m. on the evening of July 6, 1960, a service station manager's car was struck by a train. He was allegedly travelling to his employer's home to pick up a car for servicing. The complainant suffered severe multiple injuries, including amnesia. On her husband's behalf, the complainant's wife requested compensation benefits. The Board conducted an investigation and concluded that the accident did not arise out of and in the course of the complainant's employment. In the Board's view the complainant was travelling home at the time of the accident. Twenty years later, after regaining his memory, the complainant appealed the Board's decision not to grant him compensation benefits. The Board conducted two further investigations prior to upholding its initial decision.

Twenty-three years after the accident, our office conducted an investigation which included reviewing microfilmed material, maps of the accident site and routes taken prior to the accident, police reports and all the statements taken pertaining to the complainant's intentions and activities prior to and at the time of his accident. Because of the length of time that had passed since the accident, we were confronted with statements about the worker's activities which were inconsistent. There was insufficient evidence to establish that the complainant was in the course of his employment at the time of the accident and therefore the Ombudsman was unable to support the complaint.

RECOMMENDATIONS DENIED

This year there were 19 cases in which the Ministry or Board concerned refused to implement a recommendation made by the Ombudsman. I am also reporting one case in which the recommendation was made last year.

Two cases concerned the Ministry of Correctional Services. In one case, the

Ombudsman recommended that the Ministry compensate a homeowner whose property was vandalized by inmates who had escaped from a correctional camp. In the other case, the Ombudsman recommended that the Ministry compensate an inmate who had lost his job when his Temporary Absence Pass was suspended.

Four recommendations denied related to pensions. In one case, the Ombudsman recommended that the Public Service Superannuation Board or the Ministry of Government Services compensate the complainant for the loss arising from his ill-advised transfer from the Public Service Superannuation Fund to another pension fund. In another case, the Ombudsman recommended that the Ontario Northland Transportation Commission compensate a retired employee for whom no pension provision had been made in the event of early retirement caused by illness. In two cases the Ombudsman recommended to the Ministry of Colleges and Universities that it make up pension losses suffered by two employees as a result of transfers in and out of Ministry employment.

The Ombudsman made recommendations to the Ministry of Municipal Affairs and Housing in relation to complaints arising from the North Pickering land assembly.

In another case the Ombudsman recommended that the Solicitor General provide similar benefits to a Special Constable in the Indian Policing Service as would be provided to a Provincial Police Officer. Also the Ombudsman recommended that the Ministry of the Environment pay interest to a contractor under the Public Works Creditors Payment Act.

Finally, the Workers' Compensation Board refused to implement recommendations in nine cases which the Ombudsman decided to report to the Legislature. Four cases involved recognition of an accident or disability; three cases concerned entitlement to further benefits; one case dealt with the method used to calculate benefits; and the final case dealt with entitlement to benefits for a psychiatric condition.

The detailed summaries for all of these cases appear in Volume II.

CITIZENS' COMMENTS

It is gratifying to be able to report some feedback from citizens who approached this office and were pleased with the service they received. In future reports, examples of negative feedback will also be published.

Dear Sir & Staff:

I have received the cheque from the Ministry and am very thankful and grateful to all who helped achieve this.

The money which I received reimbursed me for the initial cost of my wheelchair and paid off the bank loan I had to take out to pay my debts.

Your investigation, on my behalf, was both quick and professional. It was a wonderful comfort to find that there is someone "out there" who actually cares, and is willing to go that extra step to set wrong to right.

Belleville

I hope my letter is read by all your readers because I am so angry and distressed at comments made against our Ombudsman. Therefore I am one woman who has been helped and I would like people to know about this. Thank you Donald R. Morand our Ombudsman.

Toronto

My husband had exhausted all avenues of rectification when he heard, by way of car radio, that the Ombudsman was in Kingston - the rest is history. We are specially gratified that there is someone or some place one can turn to if one feels they have been rendered an unfair judgement.

Kingston

Please thank all your investigators for their thorough work throughout the whole procedure. Although you found my complaint unsupported the fact that the Ombudsman office did act and investigate was indeed a comfort to a helpless concerned parent.

Sudbury

Thank you for your letter regarding the decision by the Workers' Compensation Board to reverse their decision in my favour.... This decision has certainly restored my faith in the democratic process and may I express to you my appreciation that the Ombudsman's Office exists in Ontario.

London

Premier W. Davis:

I had occasion to enlist the aid of the Ombudsman's Office to resolve a policy problem with the Ministry of Natural Resources. It is to the credit of the Government of Ontario that a system is in place and that it does work.

North Bay

I wish to thank your office and your staff for the help and support your office gave me in a recent settlement regarding a correctional institution matter.

Burritt's Rapids

I wish to comment on the prompt action of your office....

I telephoned today to find out if there was a time limit to your office and was told that all your officers were busy but that one would call me back.

In less than one half hour I was called back and received quick, clear, and concise advice. It has been a long time since I have received such service, public or commercial, over the telephone.

Toronto

I wish to thank the two gentlemen from your office who worked on the above investigation....

The handling of this case seemed to me to be innovative and the end result was so satisfying to everyone concerned, that I felt it should be drawn to your attention They took the role of "conciliators" and concentrated on getting open communications going....

Thunder Bay

ONTARIO OMBUDSMAN STAFF

MARCH, 1984

ALLAN, John
ARKELL, Tim
BAILIE, Sam
BERNARD, Mitchell
BOHNEN, Linda
BOOTHBY, Paula
BOROWYK, Laryssa
BOURNS, Maureen
BOYER, Corinne
BRADBURY, Laura
CAP, Wanda
CARLINO, Gerry
CATTON, Niki
CHIC, Jacquie
COLEY, Andy
CONROY, Nadene
COOLMAN, Joyce
CRESSMAN, Stephen
CROSSLEY, Barbara
DESBIEENS, Pauline
DOHERTY, David
DRAKE, Karen
DUNNILL, Michael
ELDRIDGE, Carole
ESTORBA, Josie
EVANS, Cathy
FELDMAN, Cara
FENTON, Mary Jane
GABRIEL, Liz
GIORGIO, Rita
GIULIANI, Gary
GLEASON, Marie
GRAY, Virginia
GRIFFIN, Dianne
HACHMANN, Grant
HARRINGTON, Ed
HARRIS, Richard
HARTMAN, Ruth
HEAD, Sylvia
HILL, Dr. Daniel G.
HIRST, Barbara
HOBSON, Jim
HOLMES, Jackie
IANNICCA, Judy
JAMIESON, Marion
JARRETT, Maureen
JOHNSON, Gini
JONES, Christine
KAGAN, Kenneth
KATAMAY, Olga
KEARNS, Barry
KEIL, Martha
KERSHAW, Janet
KING, Dianne
KNUDSON, Inez
LANGELIER, Pierre
LA ROSA, George
LATINCIC, Mary Ann
LeFEVRE, Robin
LEGARDO, Lourdes

LEWIS, Cathy
LUCAS, Lourine
LYNCH, Gwen
MACDONALD, Andrew
MACEROLLO, Bob
MACKEY, David
MACNEE, Katie
MALOUF, Katy
MARKIEWICZ, Eva
MARTIN, Christine
McARDLE, Frank
McCOLLIN, Phyllis
McKAY, Catherine
McLEOD, Maret
McNAMARA, Cecilia
MENNIE, Florence
MILES, Allan
MILLS, Allan
MOODY, Eric
MORGAN, Linda
MORIN, Gilles
MORRISON, Gail
MORTON, Margaret
MOXLEY, Susie
MURPHY, Maureen
NAISH, Doug
NANTAIS, Mark
NOCK, June
O'CONNOR, Tom, Q.C.
ONEN, Zeynep
PALLASCIO, John
REID, David
ROBERT, D'Arcy
RODGERS, Faye
ROWE, Robin
RUBINSTEIN, Mark
SCHARBACH, Stephen
SCOTT, Mae
SEALEY, Carol
SEMENCIW, Joe
SKENE, Tom
SORA, David
SOUSA, Maria
STEADMAN, Dorothy
STEIN, Shari
STEVENS, Eric
STEVENS, Laura
STUART, Gerald
TAYLOR, Blair
TESLIA, Valerie
THEN, Milan
THOMS, Jo-Anne
TIMOL, Yunus
TORRANCE, William
VAN KLEEF, Joy
VIRC, Elizabeth
WALSH, Sally
WARNER, Maxine
WILSON, Larry
ZACKS, Michael

*The staff of the Ombudsman's Office is multilingual.
We can communicate in 22 languages.*

Cree
Croatian
Czech
Dutch
Estonian
English
French
German
Gujerati
Hindi
Italian
Japanese
Ojibway
Philipino
Polish
Portuguese
Russian
Slovak
Spanish
Turkish
Ukrainian
Yiddish

ONTARIO OMBUDSMAN OFFICES

TORONTO

125 Queen's Park
Toronto, Ontario
M5S 2C7
Tel: (416) 596-3300

OTTAWA

#604, 255 Albert Street
Ottawa, Ontario
K1P 6A9
Tel: (613) 234-6421

NORTH BAY

#203, 591 Main Street East
North Bay, Ontario
P1B 1B7
Tel: (705) 476-5800

THUNDER BAY

#701, 1265 Arthur Street East
Thunder Bay, Ontario
P7E 6E7
Tel: (807) 623-5058

MEMBERS OF THE SELECT COMMITTEE

ON THE OMBUDSMAN

Robert W. Runciman, M.P.P.,
Chairman Leeds

Ron Van Horne, M.P.P.,
Vice-Chairman London North

James R. Breithaupt, Q.C., M.P.P. Kitchener

Odoardo Di Santo, M.P.P. Downsview

John Eakins, M.P.P. Victoria-Haliburton

William Hodgson, M.P.P. York North

John Lane, M.P.P. Algoma-Manitoulan

Robert MacQuarrie, Q.C., M.P.P. Carleton East

Robert Mitchell, M.P.P. Carleton

Ed Philip, M.P.P. Etobicoke

René Piché, M.P.P. Cochrane North

Yuri Shymko, M.P.P. High Park-Swansea

John P. Bell Counsel to the Committee

Dr. Graham White Clerk of the Committee



The Ombudsman | Ontario

QA24N
7M
-A56



Ombudsman
Ontario

Annual Report
1983-84

Volume II

INTRODUCTION

Volume II is devoted entirely to detailed summaries of cases where the recommendation of the Ombudsman was denied by the governmental organization.

Tables of recommendations outstanding from previous reports are included as appendices.

TABLE OF CONTENTS

	<u>Page</u>
1. Detailed Summary - Ministry of Correctional Services	1
2. Detailed Summary - Ministry of Correctional Services	4
3. Detailed Summary - Public Service Superannuation Board - Ministry of Government Services	9
4. Detailed Summary - Ontario Northland Transportation Commission	11
5. Detailed Summary - Ministry of Colleges and Universities	12
6. Detailed Summary - Ministry of Colleges and Universities	20
7. Detailed Summary - Ministry of Municipal Affairs and Housing	27
8. Detailed Summary - Ministry of Municipal Affairs and Housing	33
9. Detailed Summary - Ministry of the Solicitor General	40
10. Detailed Summary - Ministry of the Environment	41
11. Detailed Summary - Workers' Compensation Board	44
12. Detailed Summary - Workers' Compensation Board	46
13. Detailed Summary - Workers' Compensation Board	50
14. Detailed Summary - Workers' Compensation Board	57
15. Detailed Summary - Workers' Compensation Board	62
16. Detailed Summary - Workers' Compensation Board	67
17. Detailed Summary - Workers' Compensation Board	77
18. Detailed Summary - Workers' Compensation Board	84
19. Detailed Summary - Workers' Compensation Board	90
 <u>Appendix A</u> Recommendations Denied Tables	 96
 <u>Appendix B</u> Recommendations Under Section 22(3) (d) or (e) as Tables	 107

DETAILED SUMMARY NO. 1

The complainant contacted the Office of the Ombudsman complaining that the Ministry of Correctional Services had failed to take responsibility for property damage caused by inmates under the Ministry's control. These inmates were assigned to serve terms of imprisonment at one of the Ministry's open camp settings.

The complainant stated that on June 28, 1981, two inmates broke into his cottage, attacked him, and stole or damaged personal property items. He stated that although the inmates had done violent acts in the past, they were nonetheless placed in the open camp with little or no supervision. He stated that, during their trial on criminal charges arising from the June 1981 incident, the inmates admitted to drinking liquor at the camp the night before.

The complainant stated that although another governmental organization awarded him compensation for his personal injuries, he felt that the Ministry should accept liability for his property losses and other costs, which were not within the scope of the other organization and reimburse him.

In May 1982, the Ombudsman notified the Ministry of his intention to investigate this matter and soon thereafter a response was received from the Ministry. The Ministry advised that it did not support the contention that the inmates at the camp received little or no supervision and took the position that the staffing patterns at the camp are satisfactory. The Ministry also had no evidence to support the complainant's allegation that the two inmates were drinking liquor at the camp on the night before the break in. It was the Ministry's position that it does not have the mechanism to directly compensate individuals who suffer losses of the sort sustained by the complainant; however, the Ministry indicated that it does maintain general third party liability insurance through policies carried by another organization of the provincial government. At that time, the Ministry was awaiting information from the insurers.

Our investigation included a review of the criminal and institutional profiles of the two inmates. This review revealed that one inmate has a ten-year history of increasingly serious criminal offences, including assaults on police officers and other assaults causing bodily harm. He violated parole conditions in 1974 and 1981, was unlawfully at large in 1978 and had failed to comply with conditions of other undertakings. He was said to have an alcohol and drug problem. The other inmate had a shorter history of less serious criminal offences. He had once escaped custody in 1977. With respect to the sentence they were serving, our investigation revealed that after sentencing, they were both classified to a correctional centre which is designated as a high medium security institution. While at the correctional centre, they applied for a transfer to the camp. As both men had maintained acceptable levels of conduct at the local jails prior to sentencing as well as at the correctional centre and as they both had short sentences left to serve, their applications were approved.

Our investigator's on site investigation at the camp revealed that staff members maintained the level of security required for a minimum security camp setting on June 27 and 28, 1981. Up until 24:00 hours on June 27, 1981, routine security checks indicated that all was in order at the camp. At 01:00 hours on June 28, 1981, a patrolling correctional officer discovered that the beds occupied

by the inmates in question were "dummied". Court evidence indicated that on June 27, 1981, one of the inmates had a visit from two relatives who "planted" two twenty-six ounce bottles of liquor in the vicinity of the camp. When the two inmates left the camp, they apparently retrieved and consumed the alcohol. Next, they broke into an unoccupied dwelling near the camp and obtained more alcohol. Then they went to the complainant's cottage and were surprised to find it occupied by the complainant. They attacked and robbed him and damaged items of his personal property. The complainant estimates his property loss or damage to be in the vicinity of one thousand dollars. On June 28, 1981, the inmates were arrested and placed in custody.

On July 9, 1981, the Minister of Correctional Services wrote a letter to the complainant expressing regret and concern over the incident. The Minister explained the selection process for and the philosophy behind the program at the camp and the factors which led his staff members to believe that the inmates were appropriate for the camp program. The Minister advised the complainant of the procedure for seeking financial compensation through another provincial governmental organization. The complainant made a claim but compensation was awarded for his personal injuries only.

On July 28, 1981, at their joint trial, the inmates pleaded guilty to the criminal charges arising from the incident on June 27-28, 1981.

On October 7, 1981, the complainant wrote to the Minister stating that no one had taken responsibility for his stolen property and inquired about how he was to recover the same. On October 29, 1981, the Minister replied to the complainant. In his letter, the Minister described the security precautions taken at the camp but did not address the complainant's inquiries regarding responsibility for his stolen property.

On the basis of the investigation conducted, the Ombudsman came to the possible conclusion that the Ministry had made an unreasonable omission in failing to compensate the complainant for his property losses or damage. Accordingly, he advised the Ministry of his tentative recommendation that the Ministry rectify its omission by compensating the complainant.

In the Ministry's response, it took the position that liability in such matters is within the discretion of the Ministry's insurers and the complainant ought to have made a claim before such became statute barred. Alternatively, the Ministry felt that the complainant could have made a claim to his own insurance company. The Ministry did not wish to establish a precedent for compensation which could prejudice insurance coverage in future claims.

Furthermore the Ministry felt that (1) it would be impossible to arrive at a fair assessment of property damage or loss due to the length of time that elapsed since the damage or loss occurred; (2) the camp does not present an unusual risk to the community; and (3) the complainant is the only person in the local community who has been the victim of an assault by inmates of the camp.

Finally, he stated that a review of the case law reveals that the Ministry would be liable for damages in the event that negligence was proven. However, there should not be liability merely because unfortunate consequences followed the decision made by a person acting within his discretionary powers.

After considering all the facts of the complainant's case including the Ministry's submissions, the Ombudsman concluded pursuant to section 22(1)(b) of the Ombudsman Act that the Ministry had made an unreasonable omission in failing to compensate the complainant for his property losses or damage.

The complainant advised this Office that, of the property losses and damages he sustained, only his automobile was covered by insurance. Furthermore, during the complainant's communications with the Ministry which were within the statutory limitation period, he was not advised that he could make a claim to the Ministry's insurers.

The Ombudsman's opinion that the Ministry ought to accept responsibility for the complainant's property losses or damage was based on the principle that if the Ministry sees fit to assume the significant risk of assigning inmates who meet the classification criteria for the high medium security correctional centre to the open setting of the camp, the Ministry ought to accept responsibility in the event of a bad risk. Accordingly, he recommended, pursuant to section 22(3)(b) of the Ombudsman Act, that the Ministry of Correctional Services rectify the omission made in the complainant's case by assessing his losses and damages at his cottage and either effecting repairs to his satisfaction, using the Ministry's supplies and services, or reimbursing him for any substantiated repair and replacement costs.

Soon thereafter, the Ministry advised the Ombudsman that the Ministry did not concur with the Ombudsman's decision and therefore the Ministry would not give any effect to the Ombudsman's recommendation. The decision was based on the following factors:

Firstly, the Ministry took the position that the camp does not pose an unusual risk to the community as evidenced by the fact that in the last few years, of all escape attempts, the complainant's case was the only incidence where a local community member was assaulted.

Secondly, the Deputy Minister pointed out that it was open to the complainant to initiate a civil action to recover compensation for his property damage from the Ministry of Correctional Services within the six-month limitation period afforded by section 11 of the Public Authorities Protection Act. It was also open to the complainant under the provisions of section 653 of the Criminal Code to make an application at the inmate's criminal trial for compensation for loss or damage to his property. The Ministry took the position that his failure to do so does not imply Ministry responsibility.

Thirdly, the Ministry has denied and continues to deny negligence in relation to his case. The Ministry has taken the position that in the absence of negligence, the Ministry cannot be held responsible for any property damage caused by the escaped inmates. The Deputy Minister was of the view that payment at this time would be unfair to both the Ministry and the general public, in the sense that the complainant would be placed in a preferred position of not having to comply with the limitation provisions of the Public Authorities Protection Act, in order to receive compensation from the Ministry.

After considering the Ministry's response, the Ombudsman determined that it was not an adequate or appropriate response to his recommendation. On November 28, 1983, pursuant to section 22(4) and section 22(5) of the Ombudsman Act, the

Premier was informed of the results of the Ombudsman's investigation. The complainant and the Ministry were also notified of the results of the investigation, and the file was closed.

DETAILED SUMMARY NO. 2

On September 9, 1982, the Office of the Ombudsman received a letter from the complainant, at that time an inmate at an Ontario jail. In his correspondence, the complainant complained that his Temporary Absence Pass (TAP) had been improperly suspended and, because he could not attend work, his employer terminated his employment.

On September 30, 1982, the complainant was interviewed by a member of my investigative staff. The complainant was advised to bring his concern to the attention of the Superintendent of the jail. It was suggested to the complainant that he contact our Office again and request an investigation if the Superintendent could not satisfactorily resolve his complaint.

On October 19, 1982, the complainant again contacted the Office of the Ombudsman and requested an investigation. On October 22, 1982, the Superintendent was informed, pursuant to section 19(1) of the Ombudsman Act, of this Office's intent to investigate the complaint, and shortly thereafter an investigation was commenced.

When the Regional Director responsible for the jail was informed of our intention to investigate, he requested that the Inspections and Investigations Branch of the Ministry of Correctional Services be allowed to conduct an internal investigation first. This Office's investigation was held in abeyance pending the completion of the Ministry's inquiries.

The result of the Ministry's investigation was received at this Office on January 7, 1983. The investigation concluded that the complaint was unfounded. The Ombudsman noted the complainant was not interviewed and none of the Ministry's findings were presented by the Ministry to the complainant for his response. Our investigator discussed the results of the Ministry's investigation with the complainant on January 26, 1983. The complainant disagreed with various findings in that investigation and as a result, our investigator continued this Office's investigation.

During this investigation, information was obtained in personal interviews with the complainant, the jail Superintendent, the Regional Director, an officer of the Inspections and Investigations Branch, the Deputy Superintendent of the jail, the jail TAP Coordinator, a Correctional Officer at the jail, the Director and a counsellor of a local Community Resource Centre, and two of the complainant's former employers.

In addition, information was obtained through a review of the complainant's institutional file and the results of the investigation conducted by the Inspections and Investigations Branch of the Ministry of Correctional Services.

Our investigation revealed the following information.

On February 24, 1982, the complainant was hired as an apprentice boat builder at the rate of \$3.50 per hour. The employer primarily manufactures sailboats; however, other fiberglass items are produced when requested.

On June 3, 1982 the complainant was admitted to the jail to serve a six-month term of incarceration. The judge who sentenced the complainant recommended that he be granted a Temporary Absence Pass in order to attend work each day. Before his admission to the jail, the complainant informed his employer that he would return to work as soon as the jail authorities could arrange his TAP. The jail authorities confirmed his employment and commencing on June 15, 1982, the complainant left the jail in order to attend work each day pursuant to a TAP.

On July 16, 1982 the complainant was transferred to a local community resource centre (CRC). Both the complainant and the Administrator of the CRC agreed later that the complainant did not adjust well to the CRC's routine.

The complainant stated that after work on July 16, 1982 he was immediately taken from the jail to the centre. After supper, he was instructed to help clean the kitchen which was infested with ants. He complained that he had worked all day and wanted to go to bed in order to get up for work at 7:00 a.m. the next morning. However, he was required to work until approximately midnight at that task.

The complainant also came into conflict over his assigned duty to clean the ashtrays at 11:15 each evening. He claims that he did not object to the chore, but did object to staying up until 11:15 in order to do it. He requested, but was not allowed, to do it in the morning before he went to work.

The Administrators at the CRC also curtailed his expense money from approximately \$20 per day to \$4 per day. The complainant complained that this limitation improperly interfered with his lifestyle. The Director of the CRC contacted the TAP Coordinator at the jail in order to verify the complainant's hours of work and the amount of money he was allowed to have. During that conversation the Director told the TAP Coordinator that the complainant was not adjusting to the house routine and that he had objected to doing his share of the work.

The incident which triggered the complainant's return to the jail occurred on July 20, 1982. As is normal procedure with any new resident in this CRC, an interview had been arranged between the complainant's parents and a counsellor of the house. The purpose of this meeting was to gather information about the inmate and to allow the inmate's family an opportunity to view the house and become aware of the rules that the inmate must adhere to. This interview is usually conducted in the absence of the inmate because the family will often talk more freely under those conditions.

During the evening of July 20, 1982, the counsellor was conducting the interview with the complainant's parents when the complainant walked into the room. The counsellor asked the complainant to leave and he did. According to the counsellor, a short while later, he reappeared and made some comments regarding the childish atmosphere of the house. He eventually left and the interview resumed. Later the complainant again entered the room and stayed until the end of the meeting.

Because of this and previous incidents, it was apparent to the counsellor that the complainant did not enjoy the atmosphere at the CRC. The counsellor therefore approached him and asked him whether he was having problems adjusting to house routine. The complainant replied that the house was childish and amounted to a large babysitting institution. The complainant indicated his desire to return to the jail. The counsellor had the complainant indicate his desire in writing and then contacted the jail and arranged for the complainant to be returned that evening.

On the following day, Wednesday, July 21, the Deputy Superintendent of the jail decided to suspend the complainant's TAP. The decision to suspend or revoke the pass would normally have been made by the Superintendent. However, the Superintendent was, at that time, on vacation.

According to the Deputy Superintendent, he decided to suspend the complainant's TAP pending an investigation into the circumstances which led to the complainant's return to the jail. The Deputy Superintendent states that he instructed the Acting TAP Coordinator to contact the complainant's employer and inform him that the complainant had been returned from the CRC to the jail and that as a result, he would not be available for work until the matter was investigated. The TAP Coordinator also informed the complainant that his TAP was suspended until the Superintendent returned from vacation and was available to review the matter.

The Ministry of Correctional Services Manual of Standards and Procedures, Section B-4, page 25 states that the Superintendent or his designate may for reasonable cause suspend a temporary absence pass at any time. The Manual states that "details and circumstances surrounding the suspension shall be detailed in writing and certified and dated per the format prescribed in the individual Authorization Permit".

The Permit which authorized the complainant's temporary absence, however, did not indicate whether any disposition was made by the Superintendent or his designate. In addition, no occurrence report was completed which would indicate the nature of the Deputy Superintendent's decision or his reasons therefor.

According to the TAP Coordinator, when she informed the employer that the complainant would not be immediately available for work, the employer stated that he would contact the jail if and when the complainant was required. The employer did not contact the jail again. No investigation was conducted and the matter was simply left for the Superintendent to consider upon his return from vacation the following Monday.

According to the employer, the complainant was an average employee. At the time that his pass was suspended, the complainant had just commenced a job manufacturing fibreglass snowblower hoods. The contract called for 50 hoods and the complainant had been trained specifically for that job. The complainant could make three hoods per day and at that rate the contract would have kept him occupied for at least two weeks.

According to the employer, he was informed by someone at the jail (whose identity he could not recall) that the complainant would not be returning to work because his pass was suspended. The person calling would not predict when the

complainant would return to work. The employer stated that the contract that the complainant was working on had a definite deadline. There were two or three other employees who were capable of doing the same job. When it was apparent that the complainant would not return, an employee was taken off a job with a less immediate deadline and instructed to complete the contract. Therefore it was not necessary to replace the complainant immediately. However, when the complainant did not reappear for work for five days, his employment was terminated. The Record of Termination issued by the employer on July 29 indicates the reason for termination as "the complainant was on TAP from the jail, went up for parole - TAP was not approved". This statement, written by a secretary who is no longer with the employer, is obviously inaccurate and probably reflects the secretary's confusion over the complainant's legal status.

The employer has stated that he could have kept the complainant busy with other work after the snowblower hood job was completed. Before the complainant's TAP was suspended, the employer had no plans to terminate the complainant's employment. The complainant's average weekly net pay calculated from the time he was hired until the date of his termination was \$134.64.

On Monday, July 26, 1982, the Superintendent of the jail returned from his vacation. Upon review of the complainant's circumstances, he decided on Tuesday, July 27, 1982 that the TAP should be reinstated. The TAP Coordinator was instructed to contact the employer and inquire as to whether the complainant's job was still available. The Coordinator was informed however, that the complainant's employment had been terminated. The complainant was later offered a TAP which permitted him to leave the institution each day to work at a non-paying community service job. The complainant accepted and completed the remainder of his sentence on the community service program. He was released from the jail on October 4, 1982.

Since it appeared to the Ombudsman that there were sufficient grounds to make a recommendation that would adversely affect the Ministry and the Deputy Superintendent, letters detailing the results of the investigation and the possible conclusion and recommendation were sent on August 9, 1983 to the Deputy Minister of Correctional Services and the Deputy Superintendent, pursuant to section 19(3) of the Ombudsman Act. Both the Deputy Minister and the Deputy Superintendent were given an opportunity to respond.

According to the Deputy Minister, the complainant failed to accept the limits and controls imposed upon him at the CRC and it was appropriate to return him to the jail and suspend his TAP pending a further investigation. According to the Deputy Minister's information, the employer was contacted and he indicated that he would contact the institution if the complainant was needed. Thus, in his opinion, there was no need to complete the investigation until the employer indicated he required the complainant's services.

The Deputy Superintendent claimed that although in the Superintendent's absence he was in charge of the institution, he had been told on an earlier occasion that he had no authority to make important decisions, including revoking or reinstating a TAP. According to the Deputy Superintendent, the Superintendent had clearly told him that a decision such as this should be deferred until his return, and in so doing, he was acting in accordance with the Superintendent's practice.

The practice at the jail was discussed with the Superintendent, the present Deputy Superintendent of the jail, and the present TAP Coordinator at the jail. The Superintendent stated that the practice of the jail when he is to be absent for a significant length of time is to inform the Regional Director in writing of the absence and the name of the person who will be in charge of the institution. Such a letter was sent to the Regional Director indicating that the Deputy Superintendent would be in charge of the jail while the Superintendent was on vacation from July 19 to July 25, 1982. All three agreed that the current practice is that in the Superintendent's absence, the Deputy Superintendent has all the power and authority of the Superintendent, including the authority to reinstate a suspended TAP. The Superintendent also stated that this was the practice at the time of the incident complained of.

From the information available, it was not possible to determine with certainty if it was actually the Superintendent's practice to restrict the powers of the Deputy Superintendent regarding TAPs at the time of the complainant's return to the jail from the CRC. It appears, however, that this is not the Superintendent's present practice. It was the Ombudsman's opinion that whether the delay in the complainant's case stemmed from the actions of the Superintendent or the then Deputy Superintendent was aside from the fact that an unreasonable delay occurred and caused the complainant to lose his employment.

The Ombudsman concluded, pursuant to section 22(1)(b) of the Ombudsman Act, that the decision on July 21, 1982 to suspend the complainant's TAP and delay consideration of the matter until the Superintendent's return on July 27, 1982 was unreasonable in view of the following facts:

- (a) Since it was reasonably foreseeable that the complainant's employment would be jeopardized by suspension of his TAP, there was an obligation to investigate without delay the circumstances surrounding the complainant's return to the jail from the CRC.
- (b) No investigation was done in order to determine whether the continued suspension was justified.
- (c) The suspension resulted in the loss of the complainant's employment.

In view of this conclusion, the Ombudsman recommended, pursuant to section 22(3)(g) of the Ombudsman Act, that the Ministry of Correctional Services compensate the complainant for the loss of wages he incurred from July 21, 1982, the date of the suspension of the TAP, until October 4, 1982, the date of the complainant's release. Since this period amounted to ten and one-half weeks, and the complainant's average weekly net pay was \$134.64, the Ombudsman recommended that the Ministry of Correctional Services compensate the complainant in the amount of \$1,413.72.

On February 15, 1983, the Deputy Minister advised the Ombudsman that the Ministry did not concur with the Ombudsman's decision and therefore the Ministry would not give effect to the Ombudsman's recommendation.

It was the Ministry's position that the staff of the local jail could not reasonably foresee that the complainant's employment was being jeopardized by the temporary suspension of his TAP. Moreover, it was the Ministry's position

that while there was a delay in the completion of the investigation in the temporary absence suspension, it could not accept the Ombudsman's position that this act in itself resulted in the loss of employment.

The Ministry also noted that the complainant's removal from the CRC, which resulted in the supervision of his TAP, was due to his request to be returned to the local jail. According to the Ministry, the suspension was for legitimate reasons, as there were clearly circumstances surrounding his behaviour in the CRC which required investigation.

Finally, according to the Ministry, this suspension and subsequent actions of the institutional staff were strictly in accordance with the Ministry of Correctional Services Act and the regulations thereunder.

After considering the Ministry's response, the Ombudsman determined that it was not an adequate or appropriate response to his recommendation. On March 30, 1984, pursuant to section 22(4) and section 22(5) of the Ombudsman Act, the Premier was informed of the results of the Ombudsman's investigation.

The Ministry and the complainant were also notified of the results of our investigation.

DETAILED SUMMARY NO. 3

On May 11, 1981, the Ombudsman received a complaint about the adequacy of advice given to the complainant relating to the transfer of his pension credits.

The governmental organization affected was the Public Service Superannuation Board (the Board) which was duly notified of the Ombudsman's intention to investigate. An investigation was carried out and the following information was established.

From 1958 the complainant was a County Jail employee contributing to the Public Service Superannuation Fund (PSSF). At that time, the PSSF pension was calculated on the average of the employee's highest three years of earnings. In 1966, the complainant was offered a new position with the County which required him to change pension plan from the PSSF to the Ontario Municipal Employees Retirement System (OMERS). The OMERS pension, being based on the employee's career average earnings, was not then as generous as the PSSF pension.

Before the complainant accepted the new position his employer wrote on his behalf to the Director of the Pension Funds Branch, Treasury Department (now Ministry of Government Services) asking if in these circumstances he could transfer his accumulated pension credits to OMERS. The Director replied by setting out the alternatives and suggesting that the name of the employee be given so that "we could supply information with respect to the advisability of such a transfer". The complainant's name was duly supplied by his employer who wrote that the County did "not wish to do anything that would affect his pension credits with the Superannuation Fund". The Director responded saying that the complainant had the choice of taking a cash refund or transferring his pension credits to OMERS. The Director ended his letter with the words: "It would appear that [the

complainant] would be well advised to request a transfer of pension credits ... rather than elect a cash refund...."

The complainant then accepted the new position and asked for his pension credits to be transferred to OMERS. As a result he lost: (i) the contributions his employer made which were not transferred to OMERS; and (ii) the right to a pension calculated on his average highest three years of earnings.

During the course of the investigation the Ombudsman advised the Board, the Ministry of Government Services and the Director that there appeared to be sufficient grounds for making an adverse report. The question was whether, in the special circumstances of this case, the Director had unreasonably failed to give the complainant complete advice about the consequences of transferring from the PSSF to OMERS. The Ombudsman acknowledged that a person in the position of the Director should not be required or expected to give advice. However, it appeared that the Director had specifically offered to "supply information with respect to the advisability of such a transfer". The employer's reply could be interpreted as an acceptance of that offer. It also seemed to the Ombudsman that, after having received the Director's advice, the complainant acted on it to his detriment. By not informing the complainant of what he might lose if he terminated his membership in the PSSF, the Director's advice appeared to be incomplete.

Representations were made to the Ombudsman by the Board, the Ministry of Government Services and the Director. The main arguments were that the Director did not offer counsel on the advisability of accepting or refusing the promotion. In the circumstances this interpretation of the inquiry made to him was reasonable. He was not asked for a detailed analysis of the two pension plans. Rather, he limited himself to "the general consequences of accepting the promotion". Furthermore, the advice he gave was to the complainant's benefit: transfer was preferable to taking a cash refund, particularly as the OMERS benefits have improved in recent years.

At the conclusion of the investigation, the Ombudsman formed the opinion that, in these particular circumstances, the Director had unreasonably failed to supply complete information with respect to the consequences of the complainant's transfer of pension credits to OMERS. His recommendation, pursuant to section 22(3)(g) of the Ombudsman Act was that the complainant be paid reasonable compensation for his loss by either the Ministry of Government Services or the Board.

The Chairman of the Board subsequently advised the Ombudsman that she disagreed with his conclusion and could not give effect to his recommendation. "Owing to the uncertainty as to what [the complainant's] career progression might have been had he not accepted the promotion, it is not possible to speculate as to the dollar amount of pension benefits which he would have been entitled to in comparison to his entitlement under the OMER System." The Chairman also advised that there was no authority allowing either the Ministry or the Board to make such an ex gratia payment. On June 30, 1983, the Ombudsman, acting in terms of section 22(4) of the Ombudsman Act, sent a copy of his report and recommendation to the Premier. The file was closed thereafter.

DETAILED SUMMARY NO. 4

A complaint was made to the Ombudsman on November 13, 1979 about a decision of the Ontario Northland Transportation Commission (the Commission) concerning the complainant's pension entitlement.

After the Commission was notified of the Ombudsman's intention to investigate an investigation was carried out, establishing the following information.

The complainant began working for a transportation company in 1941. The company provided for its management staff a "retirement policy" under which lump sum payments were made to retiring employees according to age and length of service. Employees were not required to pay contributions.

In 1973, after the complainant had been working for thirty-two years, the company was acquired by the Commission. Two years later, the management staff (including the complainant) were permitted to join and begin making contributions to the Ontario Northland Pension plan. At the same time, the Commission gave a commitment to the management staff that they would not receive less under the Ontario Northland plan than under the company's retirement policy.

In 1979, the complainant retired suffering from Huntington's disease which prevented him from working any longer. He was 56 years of age at the time and had worked for the company for a total of thirty-two years, five years of which were with the Commission.

On his retirement the Commission paid him:

- (1) a lump sum payment equal to 3/4 of his 1979 earnings (\$24,318) under the company's retirement policy; and
- (2) a refund of the contributions he had paid to the Ontario Northland Pension plan, with interest at 4% (\$6,004.52).

The complainant claimed that rather than having his contributions refunded to him, he should have been paid a pension from the Ontario Northland plan on the basis that his age and years of service were not less than 85. The Commission, however, refused; its view was that only his service in the five year period following the Commission's acquisition of the company could be counted. On this interpretation, the complainant's service and age did not total 85.

During the course of the investigation, the Ombudsman advised the Commission that there appeared to be sufficient grounds for making a report adverse to it. The question was whether the Commission had failed to provide for longstanding employees who might be forced to retire early because of ill health. It seemed to the Ombudsman that such employees were being prevented from qualifying for the same benefits as other Commission employees with the same length of service. The Ombudsman was influenced by section 29 of the Pension Benefits Act. The intention underlying this section appeared to be that, for the purpose of qualifying for a pension, continuity of service should not be artificially broken by an employment take over. The section did not apply to the complainant's circumstances because the company retirement policy was not a

pension plan as defined by the Act. However, the purpose of the company retirement policy, and likewise a pension plan proper, was clearly to give a benefit after long service. It therefore seemed equitable to the Ombudsman that the Commission should have given effect to section 29 and made provision in its plan for the complainant and other longstanding company employees to count their company service in order to qualify for a pension.

The Commission submitted representations to the Ombudsman arguing that its authority to make pension payments was derived from the regulations governing the Ontario Northland Pension plan. Since the complainant was not qualified under the regulations, the Commission was not authorized to pay him a pension. The Commission argued further that its actions in refunding the complainant's contributions with 4% interest was consistent with the practice of other pension plans. Finally, the Commission felt its commitment in 1975 meant that the company retirement policy would become redundant as soon as company personnel qualified under the Ontario Northland plan.

At the conclusion of the investigation, the Ombudsman formed the opinion that the Commission had unreasonably failed to make proper provision in its plan for employees in the complainant's circumstances. His recommendation under section 22(3)(g) of the Ombudsman Act was that the Commission pay the complainant a lump sum representing the pension benefits he would have received from the date of his retirement to the present time (approximately \$95 a month) as set off against the sum of \$6,004.52 (being the amount of his contributions, plus 4% interest, refunded to him in 1979) and that there after the complainant should continue to receive this monthly pension.

The Commission subsequently advised the Ombudsman that it did not intend to implement his recommendation. On June 7, 1983, the Ombudsman, acting in terms of section 22(4) of the Ombudsman Act, sent a copy of his report and recommendation to the Premier. The file was closed thereafter.

DETAILED SUMMARY NO. 5

The complainant first complained to our Office at private hearings in September of 1981. He confirmed his complaint to our Office by letter dated November 6, 1981. He complained of a short-fall in his pension entitlement resulting from transfers of his employment from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities and back again to the Ministry of Agriculture and Food.

By letters dated January 5, 1982, the Chairman of the Public Service Superannuation Board and the Deputy Minister of Agriculture and Food, were informed by the Ombudsman of his intent to investigate this complaint. The results of those investigations were the subjects of separate reports.

On May 14, 1982, the Ombudsman wrote to inform the Minister of Colleges and Universities of our intention to investigate the complaint against that Ministry. In that letter, the complainant's contentions were outlined as follows:

In 1946, the complainant joined the staff of the Ontario Veterinary College (OVC) of the Department of Agriculture and Food as a probationary employee. His appointment became permanent in January, 1947, at which time he began contributing to the Public Service Superannuation Fund (PSSF). He contributed to the PSSF until 1965, when OVC was incorporated into a newly-formed University and he was transferred from the public service to employment with the University.

Since he was no longer classified as a public servant, the complainant was required to terminate his membership in the PSSF and join the University's pension plan. His pension credits in the PSSF were transferred to the University pension plan.

In June, 1971, the complainant was transferred back to the public service when the Ontario government agreed to take over diagnostic services from the University. The complainant again transferred his pension credits, this time from the University plan to the PSSF.

While the complainant was in the employ of the University, on April 10, 1969, he received a memorandum addressed to all faculty and staff members from the Director of Personnel. In this memorandum, the following statement regarding pension benefits was quoted:

'In no event will the sum of past service pension and future service pension as above provided, payable at normal or later retirement, be left on that pension that would have been paid for the same period of service under the public service plan as in effect that your retirement under this plan, calculated on the assumption that your salary in each year on and after September 1, 1965, is the greater of (i) the salary you would have received from public service if your salary had progressed normally within the salary classification for your position on August 31, 1965; and (ii) your salary from public service on August 31, 1965 multiplied by the ratios that the consumer price index for the year in question bears to the same index for the year 1965.'

In May, 1972, the complainant received a statement from the Pension Funds Branch of the Department of Treasury and Economics indicating that in order for him to have a continuous pension from January 2, 1947, he must make up a deficit of payment of \$2,774.79. The short-fall resulted from the fact that the University paid only 4% towards his pension during his six years of employment with them rather than the 6% the Ontario government had been paying. The complainant has not yet paid this difference. He contacted officials at the University, in the Ministry of Government Services, and in the Ministry of Agriculture and Food about the requirement to make up the difference, but his attempts to resolve the problem have not been successful.

In 1977, well after the complainant had been transferred back to the public service, his former colleagues in the OVC, who were taken over in 1965 but who were not affected by the second transfer in 1971, began legal proceedings to establish the pension rate. A settlement was reached in 1977 in terms of which the provincial government agreed to

compensate the pension loss suffered by about 570 university staff involved in the first takeover in 1965. The settlement did not cover the complainant and his colleagues in diagnostic services who were the subject of the second transfer, although they too were taken over in 1965.

Like his former colleagues, the complainant claims that, when he was taken over in 1965, he was assured that he would not be worse off than he would have been had he stayed in the public service. The Ministry of Colleges and Universities, he alleges, by settling the claim in 1977, has apparently accepted that such assurances were given, and accepted responsibility for them.

The complainant states that his loss is not only the short-fall in employer contributions to his pension, which he has been asked to make up, but he has also lost the right to a pension calculated on the average of his best three years of earnings. This he would have been entitled to had it not been for the take-over in 1965. The PSSF formula changed at the end of the same year, 1965, and a less advantageous pension, based on the average of the best five years' earnings was offered to all those entering the public service after January 1, 1966. The 1971 transfer meant that the complainant was deemed to have re-entered the public service at that date, and thus lost the right to a pension calculated on the basis of his best three years' earnings.

The complainant thus contends that his loss was the responsibility of the Ministry of Colleges and Universities and he should be compensated in a like manner to his former colleagues at OVC. He claims that any differentiation of his status from that of the University employees who were not transferred back to the public service is unreasonable and improperly discriminatory. Further he contends that the unreasonable acts of the Ministry have denied him a pension calculated on the average of his best three years of earnings for which he should be compensated.

The Ombudsman also asked the Minister of Colleges and Universities whether she was prepared to give a statement of her Ministry's position on the complaint. By letter dated June 23, 1982, the Director, Personnel Branch, Ministry of Colleges and Universities, responded on behalf of that Ministry. Our investigator, who had been investigating the complaints as against the Ministry of Agriculture and Food and the Public Service Superannuation Board, then proceeded with this aspect of the investigation as well.

In the course of the investigation, the following individuals were contacted: the Director, Personnel Branch, Ministry of Colleges and Universities; the Secretary, Public Service Superannuation Board; the Director, University Relations Branch, Ministry of Colleges and Universities; the University Affairs Officer, Ministry of Colleges and Universities; the Benefits Manager, Ministry of Agriculture and Food; and the Technical Coordinator, Policy and Executive Benefits Section, Employee Benefits and Data Services Branch, Ministry of Government Services. Documents supplied by each of the Ministries, by the Public Service Superannuation Board, and by the complainant were reviewed, and meetings were held with various Ministry personnel. As a result of the investigation, the following information was obtained.

In 1946, the complainant joined the staff of the Ontario Veterinary College (OVC) of the Department of Agriculture and Food, as a probationary employee. His appointment became permanent in January of 1947, at which time he began contributing to the Public Service Superannuation Fund (PSSF). In 1965, when OVC was incorporated into a newly-formed University, the complainant was transferred from the public service to employment with the University. Since he was no longer classified as a public servant, he was required to terminate his membership in the PSSF and join the University's pension plan. His pension credits in the PSSF were transferred to the University pension plan.

In June, 1971, the complainant was transferred back to the public service when the Ontario government agreed to take over the diagnostic services from the University. The complainant again transferred his pension credits, this time from the University plan to the PSSF.

On April 10, 1969, the complainant, then in the employ of the University, received a memorandum from the Director of Personnel, which was quoted in the letter to the Minister of May 31, 1982.

On April 30, 1971, prior to being transferred back to public service, the complainant attended a meeting concerning the proposed transfer. The meeting was attended by an officer for the University and a member of the Personnel Branch of the Ministry of Agriculture and Food. The complainant states that at this meeting he was assured that his pension would be transferred back to the public service at no cost to himself and that the pension would be continuous from his initial contributions to the public service started on January 2, 1947 up to June 30, 1971, upon which date he would be returning to the public service.

In May, 1972, the complainant received a statement from the Pension Funds Branch of the Department of Treasury and Economics indicating that, in order for him to have a continuous pension from January 2, 1947, he must make up a deficit payment of \$2774.79. This short-fall resulted from the fact that the University paid only 4% towards his pension during his six years of employment with them rather than the 6% the Ontario government had been paying. The complainant refused to pay the short-fall at that time.

In 1977, colleagues of the complainant in OVC who had been transferred to employment with the University in 1965 but not transferred back to the Ministry of Agriculture and Food in 1971, began legal proceedings to establish the pension rate. A settlement was reached in 1977 in terms of which the Ministry of Colleges and Universities agreed to compensate the pension loss suffered by about 570 university staff involved in the first takeover in 1965. The settlement, however, did not apply to the complainant and his colleagues in diagnostic services who were the subject of the second transfer, although they too were taken over in 1965.

The Director, Personnel Branch, Ministry of Colleges and Universities, by letter dated June 23, 1982, responded to the Ombudsman's letter to the Minister, stating that the complainant was an employee of the Ministry of Agriculture and Food, and that his dispute was with the interpretation of the Public Service Superannuation Fund Act. He asked that we direct our inquiries to the Public Service Superannuation Board. Our investigator contacted the Manager of Benefits Delivery, Employee Benefits Branch, Ministry of Government Services, and ascertained that, since the increases in the Canada Pension Plan, the calculation of benefits on the basis of a five year entitlement for those who do

not retire until the age of 65 is now better than a calculation on the basis of three year entitlement. Our investigator therefore proceeded to investigate that aspect of the complaint which dealt with the short-fall in University contributions, and the settlement made by the Ministry of Colleges and Universities on behalf of other employees affected by the transfer.

On July 2, 1982, an Assistant Director of Investigations with our Office contacted the Director, Personnel Branch, Ministry of Colleges and Universities, in an attempt to further ascertain his Ministry's position with the differential treatment received by those employees who were and those who were not transferred back to the public service. A meeting was then arranged between our investigator and the University Affairs Officer, Ministry of Colleges and Universities. At that meeting, on August 10, 1982, the officer acknowledged that a fund of approximately \$250,000 per year is paid directly to the University by the Ministry of Colleges and Universities to provide a pension supplement for those employees of the University who suffered pension loss in the 1965 transfer. It was suggested that there might be some way of modifying the agreement between the Ministry of Colleges and Universities and the University so that the complainant would also be eligible for such a pension supplement. On September 8, 1982, our investigator was informed by a Technical Coordinator, Ministry of Government Services, of the nature of the supplemental pension fund established by the Ministry of Colleges and Universities for the benefit of the transferred employees of the University. The fund guaranteed those employees that their pension would be as good or better than that which they would have had had they stayed in the public service throughout.

Our investigator also obtained from the Technical Coordinator a list of all people who had been affected by the transfer to and from the University, and the amounts that they had been required to pay to make up the short-fall in pension contributions by the University.

During telephone conversations of January 21 and February 3, 1983, our investigator and the University Affairs Officer discussed possibilities of including the complainant in the University's extra payment plan. In a letter dated January 31, 1983, our investigator proposed alternative solutions to the matter. She suggested that the complainant's situation could be rectified either with a lump sum payment representing pension benefits he had lost, or, in the alternative, a possible monthly supplement to his pension upon retirement.

In a responding letter dated February 7, 1983, the University Affairs Officer outlined the Ministry's position as follows:

As explained in your letters, these [employees] on their return to OMAF were requested by the Public Service Superannuation Fund to pay individually specified amounts to prevent potential pension loss. For present purposes, they fall into two categories:

- A. Those who complied with the request, and
- B. Those who did not

Those in category A (eight persons) are out of pocket to the extent of the amounts they paid plus interest to date. The loss to those in category B (three persons) is measured by the pension benefits they have

lost by not making the required payment in 1971. You mention a single lump sum settlement as one possible solution for both types. This would be the preferred option from the point of view of the Ministry of Colleges and Universities.

On May 31, 1983, the University Affairs Officer telephoned our investigator and read her a draft letter of the proposed settlement. He stated that employees who had paid amounts which they should not have had to pay to have their pension benefits retained should have these amounts refunded. As for employees who refused to pay the adjustment, such as the complainant, they would receive, upon retirement, equivalent pensions to those they would have received had they paid. The difference between the pension they would get now and that they should have received would be made up yearly by the University from funds provided especially for this purpose by the Ministry.

Subsequent to this conversation, a letter dated June 13, 1983 was forwarded by the University Affairs Officer, which reflected a dramatic change in the Ministry's position. This letter indicated that the Ministry was no longer willing to consider compensation for the complainant. The University Affairs Officer now contended that the arrangement by the Ministry of Colleges and Universities to compensate former public service employees was undertaken to assist those who retired as University employees. He further contended that since it was the Ministry of Agriculture and Food which made the initial guarantee to the complainant, and since the complainant will retire as an employee of the Ministry of Agriculture and Food, it is that Ministry which should honour its original guarantee.

At this point in the investigation, having reviewed the information obtained from the Ministry of Colleges and Universities, the Ministry of Agriculture and Food, and the Pension Benefits Branch, the Ombudsman formed the view that it was open to him to make a report justifying the following possible conclusions and recommendations:

POSSIBLE CONCLUSION

It appeared that it might be open to the Ombudsman to conclude, pursuant to s. 22(1)(b) of the Ombudsman Act, that the Ministry of Colleges and Universities is acting unreasonably in not taking steps to compensate the complainant for the loss in his pension incurred by virtue of his transfer from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities, given that the Ministry of Colleges and Universities had made special arrangements to compensate others who suffered pension loss on the same transfer.

POSSIBLE RECOMMENDATION

It appeared that it might be open to the Ombudsman to recommend, pursuant to s. 22(3)(g) of the Ombudsman Act, that the Ministry of Colleges and Universities ... make arrangements to make up the loss in the complainant's pension, once this loss could be calculated.

In support of the possible conclusion and recommendation the Ombudsman noted that the Ministry of Colleges and Universities, by entering into the agreement of December, 1977 with the ex-public-servants who at that time were

working at the University, assumed responsibility for the discrepancy that had arisen between the employees' understanding of their pension entitlement and the amounts to which they would become entitled under the University's scheme. Furthermore, he noted that the lengthy discussions with our Office on the possible inclusion of the complainant in the 1977 agreement appeared to him to further underscore the Ministry's sense of responsibility for the short-fall in pension payments which arose when the complainant was an employee at the University. He also noted that the ongoing discussions had delayed his ultimate consideration of this complaint, as it had appeared that the matter might be resolved without the necessity of a recommendation.

Pursuant to the provisions of section 19(3) of the Ombudsman Act, the Ombudsman wrote to the Ministry of Colleges and Universities, as a governmental organization which might be adversely affected by his report and recommendations, on September 15, 1983, outlining the results of his investigation to date, and his possible conclusion and recommendation, and gave the Ministry the opportunity to make representations, either in writing, in person, or by counsel. By letter dated October 19, 1983, the Minister of Colleges and Universities responded to the Ombudsman's September 15, 1983 letter.

In her response, the Minister denied that there had been any change in the Ministry's position on the matter investigated, and stated that the Ministry had never acknowledged any responsibility for this complaint. She further stated that the Ministry's only involvement was with those people initially transferred from OMAF to the University who remained in the employment of the University, and that the Ministry could not be held responsible beyond that. In support of her position, she noted the following:

(a) When the initial transfer of staff took place in 1965 to the University, all staff affected were terminated from the employment of OMAF.

(b) When the complainant, among others, returned to OMAF in 1971, [he was] terminated from the employment of the University and [was] employed by OMAF as [a] new employee.

(c) When the [termination] took place referred to in (a) and (b), ... the complainant received applicable compensation as provided for under the respective termination arrangements in the manner that would apply to any other employee. In other words, [a clear separation] took place.

(d) ... the complainant [was] placed as a probationary employee of OMAF on [his] return, and treated in the same manner as other new employees.

(e) ... the complainant [was] offered the option of making up arrears with respect to [his] pension contributions. This is normal procedure where pension transfers are involved.

(f) Memorandum to file in 1979 from [a previous] Director of Personnel at OMAF, indicates that only vacation seniority was granted to the returnees. This is attached for your information. OMAF has no record of any commitment made, regarding the transfer of the complainant's pension from the University to the public service.

(g) Reinstatement of pension credit does not affect the calculation of pension (i.e. best three years vs. best five years).

In summary, the Minister, while expressing some sympathy for the complainant, expressed her opinion that the Ministry of Colleges and Universities was not the appropriate Ministry with which to pursue the matter.

In the course of his review of the Ministry's position, the Ombudsman wrote to the Minister on November 4, 1983 asking for clarification of the "applicable compensation" mentioned by the Minister in paragraph (c) of her letter to him. By letter dated November 22, 1983, the Minister provided the Ombudsman with documents which showed details of the transfers in 1965 and 1971. None of these documents indicated that any payment in lieu of pension loss was made to the complainant on his transfer from the University to the Ministry of Agriculture and Food.

On December 7, 1983 the Ombudsman wrote to the Minister once more, asking her to consider one further point. He suggested that her Ministry had accepted responsibility for pension losses suffered by persons who transferred from the public service to the University, the very loss of which the complainant complained, and attached some documents for her consideration. One of these documents was a letter from a previous Minister of Colleges and Universities to the solicitor who acted for members of the University faculty who were attempting to clarify their pension entitlement. This letter outlined the terms on which the Ministry was prepared to provide financial assistance to former civil servants who had transferred to the University in 1965, and formed the basis of the extra-payment plan outlined above. By letter dated December 29, 1983, the Minister reiterated her position that the Ministry of Colleges and Universities was responsible only for those who remained employees of the University, and that the Ministry of Agriculture and Food should be responsible for any employees who were transferred back to that Ministry following their employment with the University.

The Ombudsman carefully reviewed the documents provided to him by the Ministry of Colleges and Universities, and considered the Minister's position on this matter. It appeared to him that, although the complainant did not remain in the employ of the University, his contention that he was guaranteed no pension loss on transfer to the University was supported by the fact that the Ministry of Colleges and Universities accepted responsibility for the losses suffered by those employees who did stay with the University. It was his understanding that the complainant worked at the same job throughout, and that his transfers from Ministry to Ministry were, in essence, paper transactions. His pension loss did not arise as a result of his ultimate transfer back to the Ministry of Agriculture and Food, but rather arose because the University paid a smaller sum into the pension fund than would have been necessary to maintain his pension benefits at the former level.

On the basis of his review, therefore, the Ombudsman concluded that, pursuant to s. 22(1)(b) of the Ombudsman Act, the Ministry of Colleges and Universities was acting unreasonably in not taking steps to compensate the complainant for the loss in his pension incurred by virtue of his transfer from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities, given that the Ministry of Colleges and Universities had made special arrangements to compensate others who suffered pension loss on the same transfer.

Having thus concluded, the Ombudsman recommended, pursuant to s. 22(3)(g) of the Ombudsman Act, that the Ministry of Colleges and Universities ... make arrangements to make up the loss in the complainant's pension, once this loss could be calculated.

On March 14, 1984, the Ombudsman wrote to the Assistant Deputy Minister requesting further discussion to resolve this complaint. As no response was received prior to the end of the fiscal year, a report of this complaint was forwarded to the Premier.

DETAILED SUMMARY NO. 6

The complainant first complained to our Office by letter dated April 6, 1981. He complained of a short-fall in his pension entitlement resulting from transfers of his employment from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities and back again to the Ministry of Agriculture and Food.

By letters dated May 26, 1981, the Chairman of the Public Service Superannuation Board and the Deputy Minister of Agriculture and Food were informed by the Ombudsman of his intent to investigate this complaint. The results of these investigations are the subject of separate reports.

On May 14, 1982, the Ombudsman wrote to inform the Minister of Colleges and Universities, of our intention to investigate the complaint against that Ministry. In that letter, the complainant's contentions were outlined as follows:

In 1950, the complainant joined the temporary staff of the Ontario Veterinary College (OVC) of the Department of Agriculture and Food. In 1952, his appointment was made permanent, at which time he began contributing to the Public Service Superannuation Fund (PSSF). The complainant retired on June 30, 1981.

On two occasions during his recent career, the complainant's employment was compulsorily taken over. The first occasion was in 1965 when OVC was incorporated into a newly-formed University. The complainant was employed by the University in Diagnostic Services, and although he was deemed to be employed by the University, his salary was paid by the provincial government. This information was given to him in writing by the Dean of the University.

Since he was no longer classified as a public servant, the complainant was required to terminate his membership of the PSSF and join the University pension plan. His pension credits in the PSSF were transferred to the University pension plan.

The second take-over was in 1971 when some, but not all, divisions of Diagnostic Services were transferred back to the public service. The complainant again transferred his pension credits, this time from the University pension plan to the PSSF.

While the complainant was in the employ of the University, on April 10, 1969, he received a memorandum addressed to all faculty staff members from the Director of Personnel. In this memorandum, the following statement regarding pension benefits was quoted:

In no event will the sum of past service pension and future service pension as above provided, payable as normal or later at retirement, be less than the pension that would have been paid for the same period of service under the Public Service Plan as in effect at your retirement under this plan, calculated on the assumption that your salary in each year on and after September 1, 1965 is the greater of (i) the salary you would have received from the Public Service if your salary had progressed normally within the salary classification for your position on August 31, 1965; and (ii) your salary from the Public Service on August 31, 1965 multiplied by the ratio that the Consumer Price Index for the year in question bears to the same index for the year 1965. [Emphasis added.]

In 1977, well after the complainant had been transferred back to the Public Service, his former colleagues in the OVC, who were taken over in 1965 but who were not affected by the second transfer in 1971, began legal proceedings to establish the pension rate. A settlement was reached in 1977 in terms of which the provincial government agreed to compensate the pension loss suffered by about 570 university staff involved in the first take over in 1965. The settlement did not cover the complainant and his colleagues in Diagnostic Services who were the subject of the second transfer, although they too were taken over in 1965.

Like his former colleagues, the complainant claims that, when he was taken over in 1965, he was assured that he would not be worse off. The Ministry of Colleges and Universities, he alleges, by settling the claim in 1977, has apparently accepted that such assurances were given, and accepted responsibility for them.

The complainant's states that his loss is the right to a pension calculated on the average of his best three years of earnings. This he would have been entitled to had it not been for the take over in 1965. The PSSF pension formula changed at the end of the same year, 1965, and a less advantageous pension based on the average of the best five years earnings was offered to all those entering the Public Service after January 1, 1966. The complainant states he suffered a further loss because the university did not pay into the pension plan at the appropriate rate, resulting in the necessity of the complainant contributing an extra sum of money into the PSSF upon his transfer back in 1971.

Thus the complainant claims that his loss, like that of his former colleagues in OVC, was the responsibility of the Ministry of Colleges and Universities, and should be compensated for in like manner. He claims that any differentiation of his status from that of the University employees who were not transferred back to the Public Service is unreasonable and improperly discriminatory in view of the fact that

the complainant performed essentially the same service in the same laboratory throughout his working life, the changes of "employer" in 1965 and in 1971 being paper transactions only.

The Ombudsman also asked the Minister of Colleges and Universities whether she was prepared to give a statement of her Ministry's position on the complaint. By letter dated June 23, 1982, the Director, Personnel Branch, Ministry of Colleges and Universities, responded on behalf of that Ministry. Our investigator, who had been investigating the complaints as against the Ministry of Agriculture and Food and the Public Service Superannuation Board, then proceeded with this aspect of the investigation as well.

In the course of the investigation, the following officials were contacted: the Director, Personnel Branch, Ministry of Colleges and Universities; the Secretary, Public Service Superannuation Board; the Director, University Relations Branch, Ministry of Colleges and Universities; the University Affairs Officer, Ministry of Colleges and Universities; the Benefits Manager, Ministry of Agriculture and Food; and the Technical Coordinator, Policy and Executive Benefits Section, Employee Benefits and Data Services Branch, Ministry of Government Services. Documents supplied by each of the Ministries, by the Public Service Superannuation Board, and by the complainant were reviewed, and meetings were held with various Ministry personnel. As a result of the investigation, the following information was obtained.

The complainant began to work for the Ontario Veterinary College (OVC) of the Ministry of Agriculture and Food, on a temporary basis in 1950 and received a permanent appointment in 1952. He commenced contributing to the Public Service Superannuation Fund (PSSF) on October 1, 1952. He contributed to the PSSF until 1963, when the Ontario Veterinary College was incorporated into the newly formed University and he was transferred from the public service to employment with the University.

Since he was no longer classified as a public servant, the complainant was required to terminate his membership in the PSSF and join the University's pension plan. His pension credits in the PSSF were transferred to the University pension plan.

In June, 1971, the complainant was transferred back to the public service when the Ontario government agreed to take over the diagnostic services from the University. The complainant again transferred his pension credits, this time from the University to the PSSF.

While the complainant was in the employ of the University, on April 10, 1969, he received a memorandum addressed to all faculty and staff members from the Director of Personnel. The text of the memorandum is quoted above.

In May, 1972, the complainant received a statement from the Pension Funds Branch of the Department of Treasury and Economics indicating that in order for him to have a continuous pension from October 1, 1952, he must make up a short-fall in his contribution to the Fund of \$605.75. This short-fall resulted from the fact that the University paid only 4% towards his pension during his six years of employment with them rather than the 6% the Ontario government had been paying. The complainant accordingly paid the required amount.

In 1977, colleagues of the complainant in OVC who had been transferred to employment with the University in 1965 but not transferred back to the Ministry of Agriculture and Food in 1971, began legal proceedings to establish the pension rate. A settlement was reached in 1977 in terms of which the Ministry of Colleges and Universities agreed to compensate the pension loss suffered by about 570 university staff involved in the first takeover in 1965. The settlement, however, did not apply to the complainant and his colleagues in Diagnostic Services who were the subject of the second transfer, although they too were taken over in 1965.

The Director, Personnel Branch, Ministry of Colleges and Universities, by letter dated June 23, 1982, responded to the Ombudsman's letter to the Minister, stating that the complainant was an employee of the Ministry of Agriculture and Food, and that his dispute was with the interpretation of the Public Service Superannuation Fund Act. He asked that we direct our inquiries to the Public Service Superannuation Board. Our investigator contacted the Manager of Benefits Delivery, Employee Benefits Branch, Ministry of Government Services, and ascertained that, since the increases in the Canada Pension Plan, the calculation of benefits on the basis of a five-year entitlement for those who do not retire until the age of 65 is now better than a calculation on the basis of three-year entitlement. Our investigator therefore proceeded to investigate that aspect of the complaint which dealt with the short-fall in University contributions, and the settlement made by the Ministry of Colleges and Universities on behalf of other employees affected by the transfer.

On July 2, 1982, an Assistant Director of Investigations with our Office, contacted the Director, Personnel Branch, Ministry of Colleges and Universities, in an attempt to further ascertain his Ministry's position with the differential treatment received by those employees who were and those who were not transferred back to the public service. A meeting was then arranged between our investigator and the University Affairs Officer, Ministry of Colleges and Universities. At that meeting, on August 10, 1982, the Officer acknowledged that a fund of approximately \$250,000 per year is paid directly to the University by the Ministry of Colleges and Universities to provide a pension supplement for those employees of the University who suffered pension loss in the 1965 transfer. It was suggested that there might be some way of modifying the agreement between the Ministry of Colleges and Universities and the University so that the complainant would also be eligible for such a pension supplement. On September 8, 1982, our investigator was informed by a Technical Coordinator, Ministry of Government Services, of the nature of the supplemental pension fund established by the Ministry of Colleges and Universities for the benefit of the transferred employees of the University. The fund guaranteed those employees that their pension would be as good or better than that which they would have had had they stayed in the public service throughout.

Our investigator also obtained from the Technical Coordinator a list of all people who had been affected by the transfer to and from the University, and the amounts that they had been required to pay to make up the short-fall in pension contributions by the University.

During telephone conversations of January 21 and February 3, 1983, our investigator and the University Affairs Officer discussed possibilities of including the complainant in the University extra payment plan. In a letter dated January 31, 1983, our investigator proposed a solution to the matter. She suggested that the complainant's situation could be rectified with a lump sum

payment representing the sum he had paid upon transfer back to the PSSF, plus some reasonable rate of interest on this sum.

In a responding letter dated February 7, 1983, the University Affairs Officer outlined the Ministry's position as follows:

As explained in your letters, these [employees] on their return to OMAF were requested by the Public Service Superannuation Fund to pay individually specified amounts to prevent potential pension loss. For present purposes, they fall into two categories:

- A. Those who complied with the request, and
- B. Those who did not

Those in category A (eight persons) are out of pocket to the extent of the amounts they paid plus interest to date. The loss to those in category B (three persons) is measured by the pension benefits they have lost by not making the required payment in 1971. You mention a single lump sum settlement as one possible solution for both types. This would be the preferred option from the point of view of the Ministry of Colleges and Universities.

On May 31, 1983, the University Affairs Officer telephoned our investigator and read her a draft letter of the proposed settlement. He stated that employees who had paid amounts which they should not have had to pay to have their pension benefits retained should have these amounts refunded. As for employees who refused to pay the adjustment, they would receive, upon retirement, equivalent pensions to those they would have received had they paid. The difference between the pension they would get now and that which they should have received would be made up yearly by the University from funds provided especially for this purpose by the Ministry.

Subsequent to this conversation, a letter dated June 13, 1983 was forwarded by the University Affairs Officer, which reflected a dramatic change in the Ministry's position. This letter indicated that the Ministry was no longer willing to consider compensation for the complainant. The University Affairs Officer now contended that the arrangement by the Ministry of Colleges and Universities to compensate former public service employees was undertaken to assist those who retired as employees of the University. He further contended that since it was the Ministry of Agriculture and Food which made the initial guarantee to the complainant, and since the complainant retired as an employee of the Ministry of Agriculture and Food, it is that Ministry which should honour its original guarantee.

At this point in the investigation, having reviewed the information obtained from the Ministry of Colleges and Universities, the Ministry of Agriculture and Food, and the Pension Benefits Branch, the Ombudsman formed the view that it was open to him to make a report justifying the following possible conclusions and recommendations:

POSSIBLE CONCLUSION

It appeared that it might be open to the Ombudsman to conclude, pursuant to s. 22(1)(b) of the Ombudsman Act, that the Ministry of Colleges and

Universities was acting unreasonably in not taking steps to compensate the complainant for the loss in his pension incurred by virtue of his transfer from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities, given that the Ministry of Colleges and Universities had made special arrangements to compensate others who suffered pension loss on the same transfer.

POSSIBLE RECOMMENDATION

It appeared that it might be open to the Ombudsman to recommend, pursuant to s. 22(3)(g) of the Ombudsman Act, that the Ministry of Colleges and Universities reimburse the complainant the \$605.75 that he paid to maintain his pension credit in the PSSF, with interest....

In support of the possible conclusion and recommendation, the Ombudsman noted that the Ministry of Colleges and Universities, by entering into the agreement of December, 1977 with the ex-public-servants who at that time were working at the University, assumed responsibility for the discrepancy that had arisen between the employees' understanding of their pension entitlement and the amounts to which they would become entitled under the University's scheme. Furthermore, he noted that the lengthy discussions with our Office on the possible inclusion of the complainant in the 1977 agreement appeared to him to further underscore the Ministry's sense of responsibility for the short-fall in pension payments which arose when the complainant was an employee at the University. He also noted that the ongoing discussions had delayed his ultimate consideration of this complaint, as it had appeared that the matter might be resolved without the necessity of a recommendation.

Pursuant to the provisions of section 19(3) of the Ombudsman Act, the Ombudsman wrote to the Ministry of Colleges and Universities, as a governmental organization which might be adversely affected by his report and recommendations, on September 15, 1983, outlining the results of his investigation to date, and his possible conclusion and recommendation, and gave the Ministry the opportunity to make representations, either in writing, in person, or by counsel. By letter dated October 19, 1983, the Minister of Colleges and Universities responded to the Ombudsman's September 15, 1983 letter.

In her response, the Minister denied that there had been any change in the Ministry's position on the matter investigated, and stated that the Ministry had never acknowledged any responsibility for this complaint. She further stated that the Ministry's only involvement was with those people initially transferred from OMAF to the University who remained in the employment of the University, and that the Ministry could not be held responsible beyond that. In support of her position, she noted the following:

(a) When the initial transfer of staff took place in 1965 to the University, all staff affected were terminated from the employment of OMAF.

(b) When the complainant, among others, returned to OMAF in 1971, [he was] terminated from the employment of the University and [was] employed by OMAF as [a] new employee.

(c) When the [termination] took place referred to in (a) and (b), ... the complainant received applicable compensation as provided for under the respective termination arrangements in the manner that would apply to any other employee. In other words, [a clear separation] took place.

(d) ... the complainant [was] placed as a probationary employee of OMAF on [his] return, and treated in the same manner as other new employees.

(e) ... the complainant [was] offered the option of making up arrears with respect to [his] pension contributions. This is normal procedure where pension transfers are involved.

(f) Memorandum to file in 1979 from [a previous] Director of Personnel at OMAF, indicates that only vacation seniority was granted to the returnees....

(g) Reinstatement of pension credit does not affect the calculation of pension (i.e. best three years vs. best five years).

In summary, the Minister, while expressing some sympathy for the complainant, expressed her opinion that the Ministry of Colleges and Universities was not the appropriate Ministry with which to pursue the matter.

In the course of his review of the Ministry's position, the Ombudsman wrote to the Minister on November 4, 1983 asking clarification of the "applicable compensation" mentioned by the Minister in paragraph (c) of her letter to him. By letter dated November 22, 1983, the Minister provided the Ombudsman with documents which showed details of the transfers in 1965 and 1971. None of these documents indicated that any payment in lieu of pension loss was made to the complainant on his transfer from the University to the Ministry of Agriculture and Food.

On December 7, 1983 the Ombudsman wrote to the Minister once more, asking her to consider one further point. He suggested that her Ministry had accepted responsibility for pension losses suffered by persons who transferred from the public service to the University, the very loss of which the complainant complained, and attached some documents for her consideration. One of these documents was a letter from a previous Minister of Colleges and Universities to the solicitor who acted for members of the University faculty who were attempting to clarify their pension entitlement. This letter outlined the terms on which the Ministry was prepared to provide financial assistance to former civil servants who had transferred to the University in 1965, and formed the basis of the extra payment plan outlined above. By letter dated December 29, 1983, the Minister reiterated her position that the Ministry of Colleges and Universities was responsible only for those who remained employees of the University, and that the Ministry of Agriculture and Food should be responsible for any employees who were transferred back to that Ministry following their employment with the University.

The Ombudsman carefully reviewed the documents provided to him by the Ministry of Colleges and Universities, and considered the Minister's position on this matter. It appeared to him that, although the complainant did not remain in the employ of the University, his contention that he was guaranteed no pension loss on transfer to the University was supported by the fact that the Ministry of Colleges and Universities accepted responsibility for the losses suffered by those employees who did stay with the University. It was his understanding that the

complainant worked at the same job throughout, and that his transfers from Ministry to Ministry were, in essence, paper transactions. His pension loss did not arise as a result of his ultimate transfer back to the Ministry of Agriculture and Food, but rather arose because the University paid a smaller sum into the pension fund than would have been necessary to maintain his pension benefits at the former level.

On the basis of his review, therefore, the Ombudsman concluded, pursuant to s. 22(b)(b) of the Ombudsman Act, that the Ministry of Colleges and Universities was acting unreasonably in not taking steps to compensate the complainant for the loss in his pension incurred by virtue of his transfer from the Ministry of Agriculture and Food to the Ministry of Colleges and Universities, given that the Ministry of Colleges and Universities had made special arrangements to compensate others who suffered pension loss on the same transfer.

Having thus concluded, the Ombudsman recommended, pursuant to s. 22(3)(g) of the Ombudsman Act, that the Ministry of Colleges and Universities reimburse the complainant the \$605.75 that he paid to maintain his pension credit in the PSSF, with interest.

The Ombudsman's final conclusion and recommendation were reported to the Ministry of Colleges and Universities on February 17, 1984.

On March 7, 1984, the Ombudsman received a response from the Minister. It was the Minister's position that the responsibility of the Ministry of Colleges and Universities to the employees of the University had ceased in 1971 and that the Ministry was, therefore, not acting unreasonably in refusing to compensate the complainant.

On March 14, 1984, the Ombudsman wrote to the Assistant Deputy Minister requesting further discussion to resolve this complaint. As no response was received prior to the end of the fiscal year, a report of this complaint was forwarded to the Premier.

DETAILED SUMMARY NO. 7

On July 13, 1978 the Ombudsman received a letter from a lawyer registering a complaint against the Ministry of Housing from the complainants. The complaint concerned the sale of their land in North Pickering to the Province of Ontario.

The lawyer also requested that Mr. Keith Hoilett, who was then conducting hearings into a large number of complaints from people who had sold land in North Pickering to the Province, hear the complaint. Mr. Hoilett decided on September 15, 1978 that he would not do so, because of an agreement between the then Ombudsman and the then Deputy Minister of Housing that only complaints made before December 14 or 15, 1977 would be included in the hearings. Under the agreement, which was never reduced to writing, any subsequently made complaints would be investigated by the Ombudsman's Office in the normal course. Mr. Hoilett said that he wanted to avoid the contingency of the hearings being extended indefinitely by new complaints filtering in. He pointed out that the agreement,

as he understood it, did not "extinguish any rights that these complainants may or may not have". (Transcript, Volume 347, p. 34,736)

On October 23, 1978, the Ombudsman notified the Deputy Minister of his intent to investigate the complaint. The complaint was outlined as follows:

That the government of Ontario announced on March 2, 1972 that they were going to acquire his property as part of a program to build a new city adjacent to a proposed new airport site.

That in the subsequent taking of his property he was not offered adequate compensation to replace it and that the officials of the project refused to consider his recommendation of comparable properties for use in determining value.

That he was told he could sell his property to the Provincial Government only and that he would not receive any more compensation than he was being offered, and that in fact he may even receive less, if he waited until the government expropriated his property.

That they were not happy with the compensation offered when they finally sold their property to the government, but that at that time they felt their negotiations had come to an end and that they had no other option open to them.

The Deputy Minister replied on November 7, 1978. He said that the complainants' contention related to a transaction finalized in August, 1974. The Province paid \$110,250.00 for their house and two acres, and the complainants remained on the property until August, 1974 when they were paid an additional \$6,536.00 for entitlements. The complainants purchased a new house in February, 1974 for \$94,000.00, and the Province paid their lawyer's fees associated with the purchase. The Deputy Minister said that since the complainants bought their new property in the same time period in which they sold, they were able to take advantage of the rising market apparent across Ontario. He also felt that if the complainants had a valid concern they would have taken it to the Ministry or the Ombudsman earlier. He referred to the widespread publicity generated by the Ombudsman's first report on North Pickering and the subsequent hearings under the Ombudsman Act. He felt that further expenditure of public funds on investigation of and inquiries into the complaint would be inequitable and unjust. He asked that the Ombudsman exercise his discretion under section 18(2) of the Ombudsman Act not to investigate the complaint.

On March 15, 1979, the Ombudsman notified the new Deputy Minister that in his opinion it would be inappropriate to refuse to investigate the complaint. He noted that the complaint had been brought to the attention of the Office of the Ombudsman as early as February of 1977. He said that the delay in coming forward could be considered in forming an opinion about the merits of the complaint, but would be insufficient justification for him to refuse to investigate.

The Ombudsman's letter prompted a further response from the new Deputy Minister dated April 18, 1977. He said that the Province did not negotiate for the purchase of properties on a replacement cost basis but rather on a market value basis, in the spirit of the Expropriations Act. He said that Project officials did, in fact, consider the complainant's recommendation of comparable

properties for use in determining market value. He said that the complainants voluntarily entered into an agreement of purchase and sale with the Province on January 4, 1974, and made no overtures to the Ministry to have their offer withdrawn and cancelled, to await expropriation, despite the Minister's announcement on January 10, 1974 that the area in which the complainants resided would be expropriated.

In September, 1979 the complainants and the new Deputy Minister were notified that the file would be held in abeyance and no investigation conducted until the completion of hearings being conducted by Mr. Hoilett.

After the conclusion of the hearings, Mr. Hoilett wrote a report which was sent to the Ministry (and various other parties) in accordance with section 19(3) of the Ombudsman Act. The Ministry and the other recipients of the report were afforded the opportunity to make representations to the Ombudsman with respect to it. The report also formed the basis for settlement discussions between the Ministry and the Ombudsman. During these discussions, the then Counsel and Special Adviser to the Ombudsman raised with the Ministry the treatment of complaints held in abeyance, including this complaint.

Copies of notices of intent to investigate all the complaints then held in abeyance were provided to the then Director of Land Operations for the Ministry. He undertook to advise our Counsel and Special Adviser whether the Ministry was willing to settle with these complainants on the same basis as it proposed to settle with the Hoilett complainants. Unfortunately, he did not give any advice to our Counsel and Special Adviser regarding the complainants or the other complainants in the same category prior to his transfer to another branch of the Ministry. On December 20, 1982 the Ombudsman issued the Report of the Ombudsman of Ontario as a result of Certain Complaints in Relation to the North Pickering Project. In it he disclosed that he had reached agreement with the Minister on a revised settlement proposal under which the majority of complainants would receive additional compensation for their land. The report did not discuss complaints held in abeyance.

The matter was then raised with the successor as Director of Land Operations, who requested a written statement of the Ombudsman's position on the complaint. In a letter dated March 3, 1983 to the Minister of Municipal Affairs and Housing, the Ombudsman, after setting out the facts, wrote:

It appears to me that the complainants should be compensated for their property according to the same principles as the other North Pickering complainants. It is therefore my recommendation that the formulae contained in the revised settlement proposal be applied to them.

On August 2, 1983, the successor as Director of Land Operations replied to the Ombudsman's letter. He referred to the Deputy Minister's previously stated position and said that he was unable to identify any further evidence which would lead the Ministry to differ from this conclusion. He added:

In light of the Deputy Minister's letters of April 18, 1979 it would be helpful if you identify those comments with which you disagree, and why, and how your office considers these two complaints should be dealt with.

By letter dated November 22, 1983, the Ombudsman wrote to the Minister, pursuant to section 19(3) of the Ombudsman Act, stating his tentative views on the complaint. The letter stated:

In my opinion, it might be open to me to make a report that would justify the possible conclusion and recommendation referred to below. The possible conclusion and recommendation are as follows:

Possible Conclusion

In my opinion it may be open to me to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry of Municipal Affairs and Housing has unreasonably omitted to pay [the complainants] fair compensation for their land.

Possible Recommendation

In my opinion it may be open to me to recommend, pursuant to section 22(3)(b) and (g) of the Ombudsman Act, that [the complainants] be included in the revised settlement proposal for North Pickering concluded by the Ministry and the Ombudsman, and that they be paid additional money for their land in accordance with its terms.

The Ombudsman said that, in his opinion, the last two paragraphs of the complainants' contentions set out the "typical" North Pickering complaint. He referred to the Ombudsman's Report, Pages 227-228, in which Mr. Hoilett is quoted as follows:

The early decision of Project Officials to establish market values as of March 1 or 2, 1972 had the obvious merit of uniformity and having regard to the early expectations as to the timing of expropriation and the immediately antecedent market conditions, may even have been a reasonable decision. It had the effect, however, of effectively freezing market values or creating the impression of frozen market values - a perception that was fostered by the acts and omissions of the Project and its officials.... [Emphasis added.]

The Project's early adherence to March 1972 values and the fostering of the impression that it would not alter its position, given the rise in the real estate market outside the Project area, that was becoming increasingly apparent, created undue pressure on North Pickering landowners, many of whom would have to seek replacement properties in a rising market using 1972 dollars. The fact that agents were at the time representing to landowners that they stood to lose by waiting for expropriation simply exacerbated a situation that was becoming increasingly intolerable.

He continued:

The other part of the complaint is that they were not offered adequate compensation to replace their house. Mr. Hoilett's conclusions on replacement problems were quoted at pages 222 to 224 of the Ombudsman's Report. In general, he concluded:

... the evidence strongly supports the general conclusion that, even granting some reasonable definition of replacement, many landowners encountered difficulties in replacing their properties for the amount of compensation received from the Project.

Mr. Hoilett outlined several reasons for the replacement problems, and noted that the extent of the problem varied from case to case. He concluded that in cases of greatest hardship the Ministry ought to have invoked section 15 of the Expropriations Act and given some effect to the "home for home" concept, and that the Project's failure to do so was an unreasonable omission. The Ministry, in its representations to the Ombudsman, disagreed with Mr. Hoilett's conclusion. However, in the final settlement agreement, for residential properties on less than 10 acres the Ministry proposed to pay an additional 10% of the updated market value in recognition of the replacement difficulties.

Essentially, it was the Ombudsman's view that the complaint was typical of the North Pickering complaints which were resolved by the revised settlement proposal. The findings of fact made by Mr. Hoilett appear to apply to the complainants' situation as much as to the complainants included in the proposal. It was therefore the Ombudsman's tentative view that the complaint should be included in it.

The Minister made written representations to the Ombudsman by letter dated January 12, 1984. He wrote:

My Ministry was first apprised of [the complainant's] complaint in mid-1978 by ..., a counsel for complainants at the Hoilett hearings. [The complainant] had been interviewed over the telephone by [an Ombudsman employee] on February 17, 1977. [The Ombudsman's employee] had contacted [the complainant] in a search for witnesses to give similar fact evidence on behalf of [the complainants] at the Donnelly Commission. [The Ombudsman's employee's] interview record with [the complainant] which was produced to Ministry counsel by [the complainant's lawyer], does not disclose that [the complainant] made a complaint to the Ombudsman at the time of his interview with [the Ombudsman's employee]. The Ministry was formally notified of [the complainant's] complaint to the Ombudsman by a letter dated October 23, 1978.

I concur with the statement of [one of our former Deputy Ministers] who advised Mr. Hoilett, then Temporary Ombudsman, in November of 1978, that if ... [the complainant] had valid concerns that [he] would have brought them to the attention of the Ombudsman earlier than [he] did.

The Minister added that the Ministry had rejected Mr. Hoilett's report and had specifically rejected Mr. Hoilett's conclusion that the government created the impression that land values were frozen and that the the Government unreasonably omitted to apply section 15 of the Expropriations Act.

The Minister said that the settlement proposal had been put forward by the Ministry to resolve "qualifying" Hoilett and Donnelly complaints. He said, "It was never intended to be an admission of liability with respect to the

Government's land acquisition programme in North Pickering nor was it intended to apply automatically to any subsequent North Pickering complaints."

Accordingly, the Minister stated that he could not agree with my possible conclusion and recommendation.

The Ombudsman carefully considered the Minister's representations.

It is true that the complainants' formal complaint was made well after the Hoilett and Donnelly complainants had come forward. On the other hand, the complainants' dissatisfaction was made known to the Office of the Ombudsman in February of 1977. As the Ombudsman understood it, the Minister's point was that the complainants' delay in making their formal complaint tended to disprove the merit of it. The Ombudsman was satisfied that on its merits, the complaint ought to have been treated the same way as the complaints resolved under the revised settlement proposal. The Ministry could not argue that it was taken by surprise by the complaint or that it budgeted and planned on the basis of known complaints, excluding this complaint. The agreement reached by the first Ombudsman and the then Deputy Minister establishing December 14 or 15, 1977 as the termination date for complaints to be heard by Mr. Hoilett expressly contemplated that the Ombudsman would investigate and report on subsequent complaints. If such complaints had been forgotten, the then Director of Land Operations for the Ministry was reminded of them during the settlement discussions between the Ombudsman and the Ministry.

While it was true that the settlement proposal dealt with the Hoilett and Donnelly complaints only, to the Ombudsman's knowledge the Ministry did not take the position during the settlement discussions that it would refuse to extend the settlement to include this complaint and other complaints held in abeyance. Indeed, according to a memorandum to file prepared by our Counsel and Special Adviser:

Following the Ombudsman's first meeting with the then Deputy Minister and [outside legal counsel] at the request of [the Director of Land Operations], [the Ombudsman] sent copies to [the Director of Land Operations] of all 19(1) letters and replies. Apparently the Ministry couldn't locate their documentation.

Since the Ministry's revised settlement proposal did not address those few complaints being held in abeyance where the proposal might be applicable, I asked [the Director of Land Operations] about one month ago to give me some indication as to whether the Ministry was prepared to settle with these one or two complainants on the same basis as was set out in the Ministry's revised settlement proposal. [The Director of Land Operations] indicated that he would have to check and get back to me.

Since I did not hear from [him], I contacted him on December 20 and again put the same question to him. At that time [he] agreed to prepare a memorandum for me addressing all the complaints, the 19(1) letters and the replies of which I had sent him, indicating whether or not they will be covered by the proposal or not, and if not, why not. For example, it was his understanding that some of these complainants had already settled independently with the Ministry.

Finally, it is not the Ombudsman's intention to apply the settlement automatically to all subsequent North Pickering complaints. Indeed, since the issuance of the Ombudsman's Report this office has declined to investigate a small number of "new" North Pickering complaints precisely because of the complainants' delay in coming forward.

It was therefore the Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry of Municipal Affairs and Housing had unreasonably omitted to pay the complainants fair compensation for their land.

The Ombudsman recommended, pursuant to section 22(3)(b) and (g) of the Ombudsman Act, that the complainants be included in the revised settlement proposal for North Pickering concluded by the Ministry and the Ombudsman, and that they be paid additional money for their land in accordance with its terms.

The Ombudsman's final conclusion and recommendation were reported to the Ministry on February 13, 1984.

On March 30, 1984, the Ombudsman reported this complaint to the Premier as no response had been received from the Ministry, and, in the Ombudsman's opinion, a reasonable time had passed and the Ministry had not taken action which the Ombudsman considered appropriate or adequate.

DETAILED SUMMARY NO. 8

The complainant first contacted the Ombudsman by letter dated March 1, 1978. In his letter the complainant complained that he had been unfairly treated by the Government of Ontario in the purchase of his land in North Pickering. On October 6, 1978, the Ombudsman notified the then Deputy Minister of Housing of his intent to investigate the complaint. The complaint was outlined as follows:

That the government of Ontario announced on March 2, 1972 that they were going to acquire his land as part of a programme to build a new city adjacent to a proposed new airport site.

That written publications from the government, reports in the media and conversations with officials of the government clearly indicated that the price he would be paid for his land, either by voluntary negotiated sale to the province or by the only alternative of expropriation, was the market value as it existed on March 2, 1972 and that this price was fixed.

That he sold his property to the province in 1973 at a figure which represented a March 2, 1972 valuation. Whereas if he had known that the price to be paid was not fixed, and that if he had waited to be expropriated he would have received a value based on the date of expropriation rather than the date of the announcement, he would not have sold when he did.

That he acted to his detriment by believing representations made by the province and its agents and that he should now be treated fairly and in the same way as those people who were expropriated.

The Deputy Minister was also invited to state his Ministry's position on the complaint.

He replied by letter dated November 10, 1978. He stated that the complainant, a lawyer with a well-known law firm, was active in the "People or Planes" movement and was the author of a text on expropriation law. Thus the complainant was well informed about the issues. The Deputy Minister also felt that if the complainant had a valid concern he would have brought it to the Ministry or the Ombudsman earlier. He referred to the widespread publicity generated by the Ombudsman's first report on North Pickering and the subsequent hearings under the Ombudsman Act. He felt that further expenditure of public funds on investigation of and inquiries into the complaint would be inequitable and unjust. He asked that the Ombudsman exercise his discretion under section 18(2) of the Ombudsman Act not to investigate his complaint.

On March 15, 1979, the then Ombudsman notified the new Deputy Minister that in his opinion it would be inappropriate to refuse to investigate the complaint. The Ombudsman noted that the delay in processing the complaint after March 1978 appeared to be the responsibility of this Office and that it would be unjust for the complainant to suffer for this reason. He said that the delay in coming forward could be considered in forming an opinion about the merits of the complaint, but would be insufficient justification for him to refuse to investigate.

This letter prompted a further reply from the new Deputy Minister on April 18, 1979. He stated that there had been no publications by the government indicating that the price to be paid an owner would be market value as of March 2, 1972. The government could not be held responsible if there had been media reports to this effect. He referred to a letter dated February 19, 1973 to the government from the complainant, in which the complainant wrote:

I also confirm the discussion with you concerning possible income tax liability. As you know there is a Capital Gains Tax from January 1, 1972 and I will require your estimate of the value of the land at least on March 2, 1972 and your estimate of the increase in value to date of sale. From our discussion I have concluded that you have built in a factor of approximately 1% per month which for present purposes shows a total increase from March 2, 1972 to date of 12%.

The new Deputy Minister also referred to a letter to the complainant from the government dated March 1, 1973 stating market value as at March 2, 1972 to be \$236,438, followed by an Agreement of Purchase and Sale dated March, 1973 stating a price of \$263,600.

The new Deputy Minister stated that the representations by the government acknowledged increasing real estate values, and that the complainant decided to sell his property with full knowledge of them. In his view, the complainant was treated fairly during negotiations in 1973 and there was no justification to re-open the purchase price. Finally, he pointed out that the complainant received \$268,000 on May 31, 1973 and had rent-free use and occupation of the property from that date until June 30, 1975.

Meanwhile, Mr. Keith Hoilett was continuing with hearings under the Ombudsman Act with respect to approximately 90 North Pickering complainants. An additional group of complainants appeared before the Donnelly Commission.

In September, 1979 the complainant and the new Deputy Minister were notified that the file would be held in abeyance and no investigation conducted until the completion of the Hoilett hearings.

After the conclusion of the Hoilett hearings, Mr. Hoilett wrote a report which was sent to the Ministry (and various other parties) in accordance with section 19(3) of the Ombudsman Act. The Ministry and the other recipients of the report were afforded the opportunity to make representations to the Ombudsman with respect to the Hoilett report. The report also formed the basis for settlement discussions between the Ministry and the Ombudsman. During these discussions, the then Counsel and Special Adviser to the Ombudsman raised with the Ministry the treatment of complaints held in abeyance, including this complaint.

Copies of notices of intent to investigate all the complaints then held in abeyance were provided to the then Director of Land Operations for the Ministry. He undertook to advise our Counsel and Special Adviser whether the Ministry was willing to settle with these complainants on the same basis as it proposed to settle with the Hoilett complainants. Unfortunately, he did not give any advice to our Counsel and Special Adviser regarding the complainant or the other complainants in the same category prior to his transfer to another branch of the Ministry. On December 20, 1982 the Ombudsman issued the Report of the Ombudsman of Ontario as a result of Certain Complaints in Relation to the North Pickering Project. In it he disclosed that he had reached agreement with the Minister on a revised settlement proposal under which the majority of complainants would receive additional compensation for their land. The report did not discuss complaints held in abeyance.

The matter was then raised with the succeeding Director of Land Operations, who requested a written statement of the Ombudsman's position on the complaint. In a letter dated March 3, 1983 to the Minister of Municipal Affairs and Housing, the Ombudsman, after setting out the facts, wrote:

The complainant's situation seems to be the same, in principle, as the other North Pickering complainants whom the Ministry has agreed to compensate. It is therefore my recommendation that the formulae in the revised settlement proposal be applied to the complainant.

On August 2, 1983 the Director of Land Operations' successor replied to the Ombudsman's letter. He referred to the Deputy Minister's previously stated position and said that he was unable to identify any further evidence which would lead the Ministry to differ from this conclusion. As a point of interest he added that the complainant had had subsequent dealings with the Ministry on very favourable terms. He closed by stating:

In light of the Deputy Minister's letters of April 18, 1979 it would be helpful if you identify those comments with which you disagree, and why, and how your office considers these two complaints should be dealt with.

By letter dated November 22, 1983, the Ombudsman wrote to the Minister, pursuant to section 19(3) of the Ombudsman Act, stating his tentative views on the complaint. The letter stated:

In my opinion, it might be open to me to make a report that would justify the possible conclusion and recommendation referred to below. The possible conclusion and recommendation are as follows:

Possible Conclusion

In my opinion it may be open to me to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry of Municipal Affairs and Housing has unreasonably omitted to pay [the complainant] fair compensation for [his] land.

Possible Recommendation

In my opinion it may be open to me to recommend, pursuant to section 22(3)(b) and (g) of the Ombudsman Act, that [the complainant] be included in the revised settlement proposal for North Pickering concluded by the Ministry and the Ombudsman, and that [he] be paid additional money for [his] land in accordance with its terms.

My reasons are as follows.

.

In my opinion the complaint is typical of the majority of North Pickering complaints heard by Keith Hoilett. I have reviewed his contentions in the light of Mr. Hoilett's conclusions and the Ombudsman's Report, and can see nothing significant which would distinguish this complaint from those ultimately resolved by the settlement between the Ministry and the Ombudsman.

Essentially, the complainant argued that because of government publications, conversations with government officials and media reports, he was led to believe that the price that he would be paid for his land, whether he sold it voluntarily or waited for expropriation, was its value as at March 2, 1972. At pages 227 to 228 of the Ombudsman's Report, Mr. Hoilett is quoted on this contention as follows:

The early decision of Project officials to establish market values as of March 1 or 2, 1972 had the obvious merit of uniformity and having regard to the early expectations as to the timing of expropriation and the immediately antecedent market conditions, may even have been a reasonable decision. It had the effect, however, of effectively freezing market values or creating the impression of frozen market values - a perception that was fostered by the acts and omissions of the Project and its officials....

The Project's early adherence to March 1972 values and the fostering of the impression that it would not alter its position, given the rise in the real estate market outside the Project area, that was becoming increasingly apparent, created undue pressure on North Pickering landowners, many of whom would have to seek replacement properties in a rising market using 1972 dollars. The fact that agents were at the time

representing to landowners that they stood to lose by waiting for expropriation simply exacerbated a situation that was becoming increasingly intolerable.

The complainant also contended that when he sold his property in 1973, he was paid a price which represented a March 2, 1972 valuation. He claimed that if he had known the price was not fixed and that if he waited to be expropriated he would receive a value as of the date of expropriation, he would not have sold when he did. The Ministry has responded to this contention in part by arguing that the complainant acknowledged in a letter to the Ministry dated February 19, 1973 that he knew the government was paying an increase in market value of 1% a month.

Mr. Hoilett found the Ministry's update policy to be inadequate. At page 227 of the Ombudsman's Report he is quoted as follows:

... The subsequent introduction of an update policy of 1% per month to existing appraisals was a further concrete attempt by the Project to apply s. 14 of the Expropriations Act to the North Pickering context. That policy, in its genesis, was questionable in principle and in its application. The Project's policy of steadfastly adhering to that policy, with the passage of time, became increasingly more suspect. The policy was manifestly ad hoc and arbitrary.

... While the Project may not have been able, with slide-rule precision, to quantify the increases that were taking place in the real estate market, based on its market surveys, among other things, it was armed with a fund of market information that placed it in a position much superior to the individual landowners with whom it was dealing. (page 228)

The Ombudsman noted at page 298 of his Report:

Secondly, and as previously mentioned, in its original proposal, the Ministry of Municipal Affairs and Housing conceded that Project staff were unable to update sufficiently Project appraisals for many of the properties, due to the unprecedented volatility of the real estate market. This helpful admission on the Ministry's part has rendered redundant any finding by me in this respect.

Finally, the complainant argued that he should be paid fair market value as of the date of expropriation. As you know, this argument was explicitly rejected by the Ombudsman. Instead, the revised settlement agreement provided for updating prices to the date of agreement of purchase and sale.

Your Ministry has observed that the complainant is a lawyer well versed in the law of expropriation, and that he was active in the People or Planes group. The former Ombudsman did not accept that the putative expertise of any landowner justified exclusion from the revised settlement agreement. Ultimately, as you well know, a group of 18 investors were kept out of the agreement, and all others were included.

Regardless of the complainant's professional qualifications or expertise, his property was residential and I do not think the argument could be made that he should be excluded on the same basis as the 18.

Your Ministry has also referred to its subsequent dealings with the complainant, which in the Ministry's view were favourable to him. This was put to the complainant, who strenuously denied it, and also pointed out that the release he gave to the Ministry in connection with these dealings expressly excluded his complaint to the Ombudsman.

The Minister made written representations by letter dated January 12, 1984. He wrote:

I cannot agree with your opinion that the complaint is typical of the majority of North Pickering complaints heard by Mr. Hoilett. It has been noted in previous Ministry correspondence that the complainant is an experienced expropriation counsel and author of the Ontario Expropriation Handbook (Toronto, 1978). A resident of North Pickering, he was no doubt, aware of the opportunity to complain to the Ombudsman regarding the purchase of his property by the Government. However, the complainant did not submit a complaint to the Ombudsman until March of 1978.

In October 1978, the complainant served notice on the Minister with respect to the repurchase of the structure.

The Ministry denied the repurchase on the basis that any right to repurchase was at the sole discretion of the Minister and further, that any such right expired on January 31, 1975, pursuant to the original Agreement of purchase and sale. In April 1979, the complainant issued a Notice of Claim through the courts in respect to the buy-back provision. To avoid court proceedings, the Ministry sold the complainant an unserviced building lot in the Hamlet of Whitevale, for its market value of \$45,000. and also the house on his former property for \$1.00, which he was to move on to the Whitevale lot at his own expense. The repurchase price of the dwelling as agreed upon between both parties was originally \$72,800.

I acknowledge that this transaction did not in anyway interfere with the complainant's rights to pursue his complaint to the Ombudsman. Nevertheless, I think you will agree that he was the beneficiary of a very favourable transaction.

The Minister added that the Ministry had rejected Mr. Hoilett's report, and had specifically rejected Mr. Hoilett's conclusions that the initial project appraisals were effective March 1 or 2, 1972, that the government created the impression that land values were frozen and that the government unreasonably omitted to apply section 15 of the Expropriations Act. The Minister said that the settlement proposal had been put forward by the Ministry to resolve "qualifying" Hoilett and Donnelly complaints only. He said, "It was never intended to be an admission of liability with respect to the Government's land acquisition programme in North Pickering nor was it intended to apply automatically to any subsequent North Pickering complaints."

Accordingly, the Minister stated that he could not agree with the possible conclusion and recommendation.

The Ombudsman carefully considered the Minister's representations. Although the complainant's professional qualifications perhaps did not make him a typical North Pickering complainant, if indeed there can be said to be a typical complainant, the Ombudsman thought that the substance of his complaint was typical of the majority of North Pickering complaints. In the Ombudsman's opinion, the focus should have been on the facts of the complaint, and not on the character and qualifications of the complainant.

With respect to the repurchase transaction between the Ministry and the complainant, the Ombudsman would again point to the fact that the Ministry accepted a release from the complainant which expressly excluded his complaint to the Ombudsman. As to whether the complainant was the beneficiary of a very favourable transaction, the complainant pointed out that he bore the entire cost of moving the house from the old location to the new location and re-establishing it on new foundations, costs which he claimed totalled \$185,000.

As for the complainant's delay in coming forward with his complaint, it was true that he complained well after the Hoilett and Donnelly complainants had come forward. As the Ombudsman understood it, the Ministry's point was that the complainant's delay in making his complaint tended to disprove the merit of the complaint. The Ombudsman was satisfied that, on its merits, the complaint ought to have been treated the same way as the complaints resolved under the revised settlement agreement. The Ministry could not argue that it was taken by surprise by the complaint or that it budgeted and planned on the basis of known complaints, excluding the complaint. Indeed, the first Ombudsman and the then Deputy Minister had agreed that North Pickering complaints made after December 14 or 15, 1977 would not be heard by Mr. Hoilett, but would be investigated and reported by the Ombudsman's Office in the normal course (transcript of Hoilett hearings, Volume 347). If such complaints had been forgotten, then the Director of Land Operations was reminded of them during the settlement discussions between the Ombudsman and the Ministry.

While it is true that the settlement proposal dealt with the Hoilett and Donnelly complaints only, to the Ombudsman's knowledge the Ministry did not take the position during the settlement discussions that it would refuse to extend the settlement to include the complaint and other complaints held in abeyance. Indeed, according to a memorandum to file prepared by our Counsel and Special Adviser:

Following [the Ombudsman's] first meeting with the then Deputy Minister, and [outside legal counsel] at the request of [the Director of Land Operations], I sent copies to [him] of all 19(1) letters and replies. Apparently the Ministry couldn't locate their documentation.

Since the Ministry's revised settlement proposal did not address those few complaints being held in abeyance where the proposal might be applicable, I asked [the Director of Land Operations] about one month ago to give me some indication as to whether the Ministry was prepared to settle with these one or two complainants on the same basis as was set out in the Ministry's revised settlement proposal. [He] indicated that he would have to check and get back to me.

Since I did not hear from [him], I contacted him on December 20 and again put the same question to him. At that time [he] agreed to prepare a memorandum for me addressing all the complaints, the 19(1) letters and the replies of which I had sent him, indicating whether or not they will be covered by the proposal or not, and if not, why not. For example, it was his understanding that some of these complainants had already settled independently with the Ministry.

Finally, it was not the Ombudsman's intention to apply the settlement automatically to all subsequent North Pickering complaints. Indeed, since the issuance of the Ombudsman's Report this office has declined to investigate a small number of "new" North Pickering complaints precisely because of the complainants' delay in coming forward.

It was therefore the Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry of Municipal Affairs and Housing had unreasonably omitted to pay the complainant fair compensation for his land.

The Ombudsman recommended, pursuant to section 22(3)(b) and (g) of the Ombudsman Act, that the complainant be included in the revised settlement proposal for North Pickering concluded by the Ministry and the Ombudsman, and that he be paid additional money for his land in accordance with its terms.

The Ombudsman's final conclusion and recommendation were reported to the Ministry on February 13, 1984.

On March 30, 1984, the Ombudsman reported this complaint to the Premier, as no response had been received from the Ministry, and in the Ombudsman's opinion a reasonable time had passed and the Ministry had not taken action which the Ombudsman considered appropriate or adequate.

DETAILED SUMMARY NO. 9

This complaint was brought to the Office of the Ombudsman on February 11, 1982. The complainant contended that by virtue of an agreement between the Federal Department of Indian and Northern Affairs and the Solicitor General of Ontario, he, as a Special Constable in the Indian Policing Service, is entitled to employment benefits similar to those given to Provincial Police officers.

The investigation revealed that an agreement setting up the Indian Special Constable program was signed by the Federal Minister of Indian Affairs and Northern Development and by the Ontario Solicitor General on July 18, 1975. The agreement was renewed on April 11, 1981 and is to expire on March 31, 1984. Paragraph 11 of the original agreement stated that salaries and benefits were to be equivalent to those received by members of the Ontario Provincial Police. However, pension benefits have yet to be implemented.

On May 25, 1982, the Ombudsman wrote to the then Deputy Solicitor General and to the Commissioner of the Ontario Provincial Police, to notify them of the nature of the complaint and of his intention to conduct an investigation. In his response, the Commissioner stated that at the time of the 1978 federal/provincial agreement which included proposed pension arrangements, a Royal

Commission was studying pensions in Ontario. As a result, Special Constables' pensions were temporarily deferred. He further stated that subsequent to the publication of the report, steps had been taken that would soon implement the pension plan.

Further contact with the Ministry during the course of the investigation revealed that further delay in the implementation of the pension plan resulted from the formation of another study group in 1981, to consider the implications of pension plans of the civil service. Also under consideration was the question of whether a Special Reserve Constable is a provincial government employee.

Based on the results of the investigation, the Ombudsman, on July 25, 1983, tentatively concluded that the Ministry's delay in the implementation of the pension benefit scheme was unreasonable, and he tentatively recommended that the Ministry should provide these benefits. As the tentative conclusion and recommendation might have adversely affected the Ministry, the Ombudsman afforded the Deputy Minister the opportunity to make representations.

The Deputy Minister responded in a letter dated August 15, 1983. He provided three reasons as to why the pension benefits had as yet not been provided. The reasons outlined were: first, while the federal/provincial agreement contemplates pensions, it does not create an entitlement; second, while the Ministry intends to provide pensions, it is not at present feasible to do so due to a lack of funds; and, third, the decision of the Ontario Divisional Court in Re Fleming and the Commissioner of the Ontario Provincial Police impedes implementation of the plan.

The Ombudsman then notified the Deputy Minister of the Federal Department of Indian and Northern Affairs of his tentative conclusion and recommendation, as the Department might also have been adversely affected. A response was received on February 8, 1984.

After carefully reviewing the contents of both responses, the Ombudsman issued a report confirming his opinion that the delay in the implementation of the pension benefit scheme was unreasonable, and that the benefits should be provided, although not necessarily in a plan that is retroactive in nature.

No formal response to the Ombudsman's recommendation was subsequently received from the Ministry of the Solicitor General and on March 15, 1984, the Ombudsman exercised his discretion and referred the matter to the Premier for consideration.

DETAILED SUMMARY NO. 10

This complaint involved the determination of whether the complainant was a "creditor" within the meaning of the Public Works Creditors Payment Act. The complainant is the owner of a company which rented construction equipment to a contractor for use in the building of a sewer system, under contract with the Ministry of the Environment.

The Ministry stopped the construction project, and the complainant made a claim under the Public Works Creditors Payment Act for payment of the monies

owing to his company by the contractor. The Minister rejected this claim on the ground that the complainant was merely a renter of equipment, and therefore not eligible to be a creditor.

After extensive investigation, the Ombudsman concluded that the Minister's decision not to accept the complainant's claim under the Public Works Creditors Payment Act was a mistake of law, and recommended that the Minister's decision be cancelled and that he accept and consider the claim as one properly made under the provisions of that Act.

The Ombudsman received written confirmation from the Ministry that it had decided to implement his recommendation and would accept and consider the claim made by the complainant as a claim properly made under the provisions of the Public Works Creditors Payment Act. The complainant was advised that the complaint had been successfully resolved, and his file was closed.

The Ministry appointed an adjudicator to assess the amount of the claim. The adjudicator awarded the complainant \$27,730.30 on his claim for rental charges, but did not award the claim for interest charges on the amount he had originally claimed or the claim for legal costs in pursuing his claim.

On February 29, 1980, the complainant wrote to the Ombudsman's Office and complained against the Ministry of the Environment for failing to pay interest charges and legal costs as claimed.

The investigation focused on two issues: first, whether the Minister has authority under the Public Works Creditors Payment Act to pay the interest as part of, or in addition to, a payment of a claim within the meaning of section 2 of the Act, and secondly, whether the Minister has the authority under that Act to pay the claim for legal costs. Legal research indicated that the adjudicator was wrong in law to decide that the claim for interest could not form part of a claim pursuant to the Public Works Creditors Payment Act. Moreover, the Ombudsman felt that there was no jurisdictional impediment to the Minister, under the legislation, preventing him from paying interest, providing that he found that the claim for interest was part of the contractor's obligation to the creditor. The investigation showed that there was an express contractual obligation by the contractor to pay interest to the complainant.

On March 20, 1981, the Ombudsman notified the Minister and the adjudicator of his tentative conclusions and tentative recommendations, pursuant to section 19(3) of the Ombudsman Act. It was the Ombudsman's possible conclusion that the Minister's conclusion that he does not have the authority to pay interest under the Public Works Creditors Payment Act was based on a mistake of law, and as a result, the Minister had failed to properly exercise his discretion under section 2(2) of the Act.

The Ombudsman further advised the Minister of his tentative recommendation that the Minister accept and consider the claim for interest as one properly made under the provisions of the Act.

The Minister was also advised that the complainant had twice incurred legal costs, once with respect to the initial hearing, and again with respect to the hearing before the adjudicator. The Ombudsman indicated that the second set

of costs need not have been incurred but for the erroneous interpretations of the Act accepted and acted upon by the Minister. The Ombudsman then further advised the Minister that it was open to him to recommend that the complainant receive from the Ministry his legal costs for the second hearing as equitable compensation to the complainant for costs incurred directly as a result of the erroneous interpretations of the Act.

The Minister responded to the tentative conclusion, stating that the previous Minister had not made an error in the initial exercise of his discretion to reject the entire claim, but that, as a result of the interpretation given to the legislation by the Ministry, the complainant might have suffered great hardship, and therefore the Ministry had reopened its consideration on humanitarian grounds.

The Minister gave two reasons for not paying interest, as follows: first, that the Minister had an absolute discretion under the Public Works Creditors Payment Act and he had decided to exercise that discretion against the complainant; and secondly, that the complainant's solicitor waived the interest claimed at the hearing before the adjudicator.

An authority exercising a statutory discretion must have regard to all the relevant circumstances, and must act within the intent and spirit of the legislation empowering him to decide the question before him. The discretion that is exercised cannot be total to the extent that the Minister can disregard relevant circumstances or the spirit of the legislation. The Minister must not misconstrue the scope of his discretion, which it seemed the Minister might have done in this case, by believing that the claim made by the complainant was initially not a valid one and that the Minister had no authority to pay a claim for interest.

The second reason given by the Minister for not paying interest was the assertion that legal counsel for the complainant, after consulting with the complainant, waived the claim for costs and interest either prior to or during the hearing before the adjudicator. The complainant and his counsel denied this assertion and there was no evidence in support of the Minister's position.

After reviewing carefully the arguments made by the Minister, the Ombudsman issued a report confirming his opinion that the Minister's decision that he did not have the authority to pay interest under the Public Works Creditors Payment Act to the complainant was based on a mistake of law. In addition, the Ombudsman found that the Minister unreasonably exercised his discretion in not considering the complainant's claim for interest under the Public Works Creditors Payment Act.

It was the Ombudsman's recommendation that the decision of the Minister, to accept the recommendation of the adjudicator not to pay the claim for interest made by the complainant, be cancelled, and that the Minister accept and consider the claim for interest as one properly made under the provisions of the Public Works Creditors Payment Act.

Notwithstanding that he tentatively recommended that the Minister pay the legal costs on equitable grounds, the Ombudsman believed that in the context of this complaint a recommendation to pay legal costs should be based on the Public Works Creditors Payment Act. The legal research indicated that this was

not possible, and the Ombudsman was not prepared to make a recommendation to the Minister that the legal costs be paid.

The Ombudsman received a response from the Minister stating that he disagreed with these conclusions. The Ombudsman then advised the Minister that his response was not adequate or appropriate, but that he would not be sending a copy of his report to the Premier.

In addition, the Ombudsman wrote to the complainant to advise him of the Minister's response which, in his opinion, was not adequate or appropriate. The Ombudsman also advised the complainant that he would not be sending a copy of his report to the Premier.

On February 21, 1984, the complainant requested that the new Ombudsman review the report issued by his predecessor regarding his complaint, with the intention of referring the report to the Premier and then to the Select Committee on the Ombudsman for the Committee's consideration.

Having reviewed the report, the new Ombudsman exercised his discretion and on March 22, 1984, referred the matter to the Premier for consideration.

DETAILED SUMMARY NO. 11

On September 19, 1979, the complainant registered a complaint against the Workers' Compensation Board Appeal Board with this Office. She contended that her left shoulder disability arose out of and in the course of her employment, and that she was entitled to compensation benefits. After receiving notification of our intention to investigate this complaint, the Board stated that it did not wish to make a statement at that time. The file was then assigned for investigation.

The investigation revealed that for two-and-a-half years the complainant worked eight hours a day as an "underpad catcher", continuously catching pads with her left hand, packing the pads into boxes, pushing the 35-lb. boxes across the floor, and piling them onto skids. The complainant handled approximately 14,000 pads and 35 boxes per day. When pain developed in her left arm and shoulder, she was transferred to a job which required her to lift seven to eight 10-lb. rollers of material and four to five 35-lb. rollers from a pile above her head. The complainant continued at this job for nine months, and laid off with left shoulder and arm pain.

Several specialists and x-rays identified rotator cuff tendinitis. A specialist in physical medicine and rehabilitation diagnosed tendinitis and related the condition to the repetitive nature of the complainant's work. The specialist reiterated this opinion two months later. Before it reached its final determination of this case, the Appeal Board referred the complainant to a neuropsychiatrist for an assessment. The neuropsychiatrist considered tendinitis a possible diagnosis, but attributed the pain instead to a neurosis that had resulted from a conflict within the complainant concerning her type of work. The Appeal Board accepted the neuropsychiatrist's diagnosis and denied entitlement.

In the course of his investigation, the Ombudsman formed the tentative conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board was unreasonable to find that this disability did not arise out of and in the course of employment, given the medical evidence. The Ombudsman pointed to the Board policy on disablement, which indicated that entitlement will be allowed where the Board has established a relationship between "any work-related movement" and the disability. The Ombudsman then stated that the bulk of the medical evidence diagnosed tendinitis and established a relationship between the tendinitis and the complainant's type of work. He stated further that the only medical evidence that commented on the relationship between disability and the work supported this case. The Ombudsman, therefore, recommended tentatively, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant entitlement.

In its response, the Appeal Board admitted that the specialist in internal medicine and rehabilitation did establish a relationship between the disability and the work. The Board indicated, however, that it preferred the opinion of the neuropsychiatrist, who did not find such a relationship. The panel did not feel that there was sufficient medical evidence to establish "something about the work" as the cause of the disability.

The Ombudsman reviewed the medical documentation in light of the Board's response. He indicated that the neuropsychiatrist did not support a relationship, but did concede that the diagnosis of tendinitis was a possibility. The Ombudsman also stated that a diagnosis of neurosis bore no relevance to the nature of the disability suffered three years previously. He also underlined the Board policy which indicated that disability could stem from merely "a movement arising out of the work which is reasonable to consider has caused the disablement." He felt that the medical evidence had established entitlement under this category.

The Ombudsman then concluded, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board was unreasonable in denying entitlement on the grounds that an "accident" under section 1(1)(a)(3) of the Workers' Compensation Act had not been established. He recommended, pursuant to section 22(3)(g) of the Ombudsman Act, that the Board revoke its decision and grant the complainant entitlement.

The Board responded to this report on May 13, 1982. It maintained that when its policy on disablement referred to "a movement which is reasonable to consider has caused the disablement", it did not include "ordinary work ... without any element of something unusual, unless a causal relationship can be established." The Board also maintained that the specialist in internal medicine incorrectly characterized the complainant's work as "forceful", and that the neuropsychiatrist's reference to tendinitis as a possibility was mere speculation. The Board felt that the neuropsychiatrist provided the best diagnosis of the complainant's condition. After reviewing this response, the Ombudsman remained of the opinion that the complainant's disability arose out of and in the course of her employment.

The Ombudsman then exercised his discretion and referred the matter to the Premier.

Ongoing discussions continued between the Ombudsman and the Board. An agreement was eventually reached concerning disablement arising out of and in the course of employment. The agreement was reported in the Ombudsman's Tenth Report.

The complainant was advised that the Board might reconsider its previous decision in light of the report. She therefore requested a reconsideration in light of the agreement; this request was denied. The Ombudsman therefore decided to report the results of the original investigation to the Legislature in his Eleventh Report.

DETAILED SUMMARY NO. 12

The complainant approached this Office on October 2, 1981 with a complaint against a decision of the Appeal Board of the Workers' Compensation Board dated January 16, 1981. The complainant contended that the Appeal Board was unreasonable in denying him entitlement for personal injury as arising out of and in the course of his employment. The Appeal Board had concluded that, "in the absence of any evidence of an accident on or about May 18, 1979, personal injury arising out of and in the course of the complainant's employment has not been established".

On October 8, 1981, the Chairman of the Workers' Compensation Board was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. He was invited to make a statement of the Board's position on the complainant's claim.

On October 16,, 1981 the Vice-Chairman of Appeals responded on the Chairman's behalf by stating that the Board did not wish to make a statement at that time.

This complaint was assigned to two members of our investigative staff. The complainant's Workers' Compensation Board claim file supplied by the Board was thoroughly reviewed, and the relevant legislation and Board policy and practice in relation to the issue was considered.

The investigation revealed that the complainant developed a blister on his right foot while working as a quality control inspector. A diabetic who used 80 units of insulin per day, the complainant left Toronto on May 18, 1979 to work for his employer on a job site in the Sierra Mountains in Argentina.

The flight to Buenos Aires was scheduled to take 13 hours. The complainant was wearing a pair of "western-type boots" which he had purchased nine months before. The complainant's flight was delayed in Lima, Peru for about 12 hours, four of which the complainant spent in the airport, eight in a hotel. The complainant noticed a blister on his right big toe in the Lima hotel. He bathed the toe in water and covered it with a bandage.

Upon arriving in Buenos Aires, the complainant was forced to wait four hours in the airport before he received word that the airline had lost his luggage and with it the bulk of his insulin and a change of shoes and clothing. After an eight-hour hotel rest, the complainant boarded a plane which took him to Cordoba, where he waited another two hours before he received car transportation to the job site in the interior. The blister was swelling badly by this time. He still had no change of footwear as his luggage had not been found.

The day after the complainant arrived on the job site, wearing his Western boots became impossible because of the swelling. A co-worker lent him a pair of construction boots that were 1/2 size smaller than his normal size nine. However, he could get them on and they were more appropriate for the job site. His luggage had still not arrived and the location and demands of his work were such that he was unable to purchase appropriate footwear.

The complainant worked 12 hours a day for the next six days, walking and climbing constantly. The blister continued to swell until May 28, 1979 when the complainant found that he could not put on even his borrowed boots. His supervisor immediately ordered him to see a doctor in Cordoba.

Doctors in Cordoba diagnosed gangrene and suggested partial amputation. The complainant wished to return to Ontario for treatment and did so on June 9, 1979. He was immediately admitted to hospital, where he received a series of amputations over the course of the next two months which left him without a leg below the right knee.

The complainant submitted a claim for compensation. The accident employer advised a Board investigator on November 8, 1979 that it was requesting "speedy adjudication" of the claim and further requested "that (the Board) make all provisions to allow entitlement under the Act for this claim".

During the course of this Office's investigation, the Ombudsman, reached the tentative conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that "the Appeal Board in its decision dated January 16, 1981 was unreasonable to deny entitlement for personal injury arising out of and during the course of the complainant's employment". He advised the Chairman and the accident employer of his possible conclusion and recommendation in a letter dated November 10, 1982. The Ombudsman pointed out:

... the Appeal Board made specific reference to the complainant's twenty year history of diabetes. This would not appear to be a relevant consideration as the Board's Medical Advisor in memorandum #8 dismissed any relationship between the insulin intake and the infected blister. I have therefore also dismissed this concern.

It would appear that the only issue is whether or not the complainant's blister arose out of and in the course of his employment.

The evidence appears to indicate that the complainant was in the course of his employment at the time the blister developed. This is substantiated by the fact that he was travelling for the employer at the time and his employer acknowledges that he was in the course of his employment. This is also confirmed by the Board's Claims Adjudication Procedures Manual's section titled "Travel on Employer's Business", which states the following:

Where the conditions of the employment require the employee to travel away from the employer's premises, the employee is considered to be in the course of the employment continuously, except where a distinct departure on a personal errand is shown.

As it would appear that the complainant was in the course of the employment at the time the blister developed, section 3(2) would seem to apply. Specifically, because the complainant was in the course of his employment when the blister developed, it would appear that it must be presumed that it arose out of his employment. This presumption, of course, could be rebutted by contrary evidence. However, the Board has not referred to any contrary evidence in its decision.

The only other logical cause for the development of the blister would appear to be the boots, which he claims to have worn for nine months prior to the incident without problem.

It is true that the mechanical cause of the blister was the friction between the boot and the complainant's toe. However, it was the extraordinary circumstances that arose during the course of the complainant's employment that caused him to wear his boots for an extended period of time, and set the stage for the formation of the blister.

The Ombudsman tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act, "that the Appeal Board revoke its decision of January 16, 1981 and award the complainant entitlement to compensation benefits for his disability which eventually led to the amputation of his leg".

In a letter dated April 13, 1983, the Ombudsman received submissions to his section 19(3) letter from the accident employer's solicitor, who argued that the complainant's claim could only be viewed as an industrial disease and as his disability could not be considered an "industrial disease", the provisions in the Act and Regulations dealing with same did not apply. Alternatively, it was argued that the complainant did not establish that he had suffered an "accident" as contemplated by section 3(1) and therefore the presumption in section 3(2) did not apply.

The Chairman of the Board responded on January 24, 1983. He stated that the Board considers blister claims: (a) "where the blister results from any process involving continuous friction" as indicated in Schedule 3 of the Workers' Compensation Act; and (b) when the blister is "caused by footwear worn at work" under Claims Adjudication Branch Procedures Manual, Document 33-13-06, Page 1, Section 2. The Manual stipulates that, when the blister arises from "footwear worn at work", the worker is held responsible for the injury if he supplied the footwear. He then pointed out that, when his blister developed, the complainant was not engaged in a "process involving continuous friction", and was wearing footwear which he had supplied. The Chairman also stated that the complainant's representative claimed before the Appeal Board that the blister resulted from a particular accident and not the use of the boots per se. The Board apparently agreed that the boots "were not a factor", but found no causative accident. It also considered entitlement under "disablement" in section 1(1)(a)(iii), but did not find "something about the work which can be considered to have caused the disablement to come on". He concluded by stating that the Board would not implement the Ombudsman's tentative recommendation.

The Temporary Ombudsman considered this case in light of our investigation and the representations of the Board and the accident employer.

It appeared to the Temporary Ombudsman that the Board's policy concerning "infected blisters" pertained primarily to industrial employment. The schedule sets out two columns - one for the description of the disease, the other for the process. The only relevant entry is "infected blisters" which is matched in the second column with the words "any process involving continuous friction". The reference to "process" in Schedule 3 of the Act and Document 33-13-06 in the Temporary Ombudsman's opinion refers to an activity or process which is peculiar to a worker's form of employment. Entitlement under Schedule 3 of the Regulations and section 122 of the Act is relevant when the worker is engaged in an activity that is peculiar to his job. The complainant was obviously not so engaged when he was on the plane and, accordingly, the provisions of the Act and Regulations dealing with Industrial Diseases do not apply. There was therefore no dispute on this issue.

The Board indicated that in addition to Industrial Disease claims it adjudicated other claims for "infected blisters". One factor in such claims was whether the worker supplied his own footwear when the blister was "caused by footwear worn at work". It is clear that the complainant supplied his own footwear. However, for disentitlement to flow from this aspect of the Board's policy, it would have to be established that the boot alone caused the blister. If the complainant's boot had been the only cause of the blister, it would appear that the application of this policy might be justified because a relationship between the work and the disability would not be established. However, in the complainant's circumstances, the Temporary Ombudsman was unable to establish that the boots were the only or primary cause of the blister.

As the employer indicated, the complainant did not suffer a specific incident; however, the definition of accident in the Act does provide for disablement. The consideration then appears to be whether the development of the blister could be considered "disablement" under section 1(1)(a)(iii). The Board stated that it did not find "something about the work which can be considered to have caused the disablement". The Ombudsman indicated in his November 10, 1982 letter that, given the presumption in section 3(2) of the Act, the complainant did not have to establish a causal relationship between the blister and "something about the work".

As noted by the Ombudsman, the complainant's blister arose "in the course of" his employment on the trip to Argentina. The presumption in section 3(2) thus requires evidence to be adduced to show it did not "arise out of" the employment in order to justify denying entitlement. The Ombudsman pointed out that such evidence had not been adduced and concluded, further, that the available evidence established an inference in favour of entitlement. The Temporary Ombudsman agreed with this view and noted that the complainant comfortably wore his boots for nine months before his Argentina trip; he encountered several delays on the trip which forced him to wear his boots for an inordinately long period of time. The Temporary Ombudsman noted that it was reasonable to infer that the delays, which clearly arose during the course of the complainant's employment and were beyond his control, were an integral part of the circumstances which set the stage for the formation of the blister and its subsequent complications.

The Temporary Ombudsman therefore concluded, pursuant to section 22(1)(b) of the Ombudsman Act, that it was unreasonable for the Board to have denied the complainant entitlement for personal injury arising out of and in the course of his employment. He recommended, therefore, pursuant to section 22(3)(g)

of the Ombudsman Act, that the Appeal Board revoke its decision of January 16, 1981 and grant the complainant entitlement to compensation benefits for his disability which led to the amputation of his leg.

In a letter dated February 27, 1984, the Chairman of the Workers' Compensation Board advised this Office that the Board would not be implementing the Temporary Ombudsman's recommendation in this case.

The Chairman's letter stated the following, in part:

The Board cannot agree that the decision of the Appeal Board was unreasonable. In coming to this conclusion, the Board took careful note of [the Temporary Ombudsman's] response to the explanation of the panel's decision as set forth in my letter of January 24, 1983. It seems that there is no dispute that the complainant did not suffer an "accident", and that the question of entitlement is contingent on a finding that he meet the criteria for "disablement" as contemplated by Section 1(1)(a)(iii) of the Workers' Compensation Act.

In my letter of January 24, 1983, I explained why, in the Appeal Board's view, the complainant did not meet this criteria. Essentially, the Appeal Board did not consider that there was "something about the work that caused the disablement". The presumption in Section 3(2) applies only after an "accident" or disablement within the meaning of Section 1(1)(a)(iii) has been established. The Board submits that Section 3(2) cannot be used to make a determination of whether a worker meets the criteria for disablement.

As [the Temporary Ombudsman] has conceded that no "accident" as contemplated by Section 1(1)(a)(i) and (ii) took place, and since he has not established that the criteria for "disablement" pursuant to Section 1(1)(a)(iii) have been met, the Board has concluded that the decision of the Appeal Board was correct....

Having reviewed the position of the Ombudsman and subsequently of the Temporary Ombudsman, and the Board's position in this claim, the Ombudsman was in agreement with the views previously expressed by his Office. As such, the Ombudsman was of the opinion that the Board's position was unreasonable and that insufficient arguments had been presented by the Board to warrant a change in position to be taken by this Office.

The Ombudsman therefore exercised his discretion and referred the matter to the Premier on March 30, 1984. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 13

This complaint against the Workers' Compensation Board was brought to the attention of this Office in a letter dated August 20, 1982. At that time, the complainant advised that he was dissatisfied with an Appeal Board decision dated May 4, 1979, which denied him entitlement to compensation benefits for the period

from February 19, 1977 to August 20, 1977, for a low back injury arising out of a compensable accident on February 19, 1977.

By letter dated December 7, 1982, the Chairman of the Workers' Compensation Board was notified of our intention to investigate the complaint, pursuant to the requirements of section 19(1) of the Ombudsman Act. He was also asked if he wished to provide a statement respecting the Board's position.

The Assistant Secretary responded on the Chairman's behalf, indicating that the issue to be investigated had been dealt with by the Appeal Board, and the Board therefore did not have a statement to make at that time.

The complaint was subsequently assigned to two members of the Ombudsman's investigative staff.

The investigation carried out by our Office consisted of a thorough review of the Workers' Compensation Board claim file documentation, discussions with the complainant and his accountant, legal research, and a review of the relevant legislation and Board policies.

Our Office's investigation has revealed that the complainant was injured on February 19, 1977. At that time, he was, by verbal agreement, employed by a lumber company to cut and skid trees. He was paid on a piece-work basis and he used his own skidding machine in return for a 7% premium on the amount earned.

The complainant was forbidden to work elsewhere while in the employ of the lumber company.

When he was hired, the complainant was issued a copy of a document entitled "Information to Cutters" which, as well as setting out terms of employment, stated that:

Working Schedule: From Monday to Friday (take note that several times during winter we repair the roadway, frosting, etc. The roadway is therefore closed during those weekends. No one can make use of it).

All cutters customarily left their skidders parked in the bush at the job site, after a day's work. One Saturday morning, on February 19, 1977, the complainant arrived at the job and, in the course of changing a flat tire on his skidder, injured his back.

In a letter to the Board received on November 20, 1978, the complainant's manager indicated that he saw the complainant at approximately 11:45 a.m. on February 19, 1977, as he was leaving the job site. The complainant apparently advised the manager that he was taking a tire to town to be fixed, so that his skidder could be operated on Monday. He apparently did not mention that he had hurt his back.

The complainant visited a chiropractor, Dr. A., on February 21, 1977, who diagnosed a mild lumbosacral disc herniation and prescribed chiropractic manipulation three times weekly. X-rays taken the same day revealed evidence of thinning of the fifth lumbar disc and osteophytic formation between L2-3 and L3-4.

On March 24, 1977, the complainant was examined by a physician, Dr. B., who confirmed Dr. A.'s diagnosis.

The complainant's claim was initially allowed by the Board; however, on April 19, 1977, the Claims Review Branch disallowed it, on the basis that he was, at the time of his injury, in the act of repairing his own skidder on a non-scheduled work day.

The Appeals Adjudicator hearing took place on May 3, 1978, at which time the complainant stated that he worked at the job site on the date in question, until approximately 8:30 a.m., when he noticed the skidder's flat tire. He then indicated that he often worked on Saturdays, and was in fact paid for the work performed on Saturday, February 19, 1977.

Two of the complainant's co-workers, who were subsequently contacted by the Board, indicated that they never worked on Saturdays, and were unaware of any workers who did so.

The complainant's manager indicated that he could not tell from his records whether or not the complainant had worked on February 19, 1977, since workers were paid on a piece-work, rather than daily, basis; however, Saturday was not considered by the company to be a working day.

The complainant's appeal was denied on December 8, 1978.

The matter came before the Appeal Board on May 2, 1979. In its decision dated May 4, 1979, the Board noted:

... there is no evidence on record to show that the complainant had performed work for [the lumber company] on February nineteenth, 1977. The Appeal Board notes and accepts that the complainant was in the bush on February nineteenth, 1977 for the sole purpose of changing a tire on his skidder. The Appeal Board therefore concludes that it has not been shown that the complainant's low back injury arose out of and in the course of his employment on February nineteenth, 1977.

During the course of our investigation, the Ombudsman formed the view that it might be open to him to conclude, pursuant to section 22(1)(c) of the Ombudsman Act, that:

... the Appeal Board's conclusion that the changing of the tire on the skidder by the complainant was not incidental to his employment was based on a mistake of law.

In the alternative, the Ombudsman formed the view that it might be open to him to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that:

... the Appeal Board decision, which concluded that the complainant did not have entitlement for a disability in the low back because he was in the bush at the time of the injury for the sole purpose of changing a tire on his skidder, was unreasonable.

In a letter dated July 7, 1983, the Ombudsman advised the Chairman of the Board of his tentative conclusions and his consequent tentative recommendation. In support thereof, he indicated that:

It appears to be established law that, to come within the statute, the accident could have occurred while the worker engaged in an incident of

work. See Workmen's Compensation Board v. C.P.R. and Noell [1952] 3 D.L.R. 641 (S.C.C.) Rand, J. at 646.

In the case of Betts & Gallant v. Workmen's Compensation Board [1934] 1 D.L.R. 438 (S.C.C.), Mr. Justice Crocket follows Lord Atkinson's explanation of what is incidental in the case of St. Helens Colliery Co. v. Hewitson [1924] A.C. 59. Lord Atkinson is quoted at page 445:

... a workman is acting in the course of his employment when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service.

In the case of Re Kinney and Workmen's Compensation Board (1972), 27 D.L.R. (3d) 703, Mr. Justice Hughes of the New Brunswick Court of Appeal cited, as a principle to be followed, a passage in 34 Hals., 2d ed., pages 822-823:

The words "arising out of the employment" mean that, during the course of the employment, injury has resulted from some risk incident to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered.

Lord Wrenbury considered the exigencies of duty as work-related when he held in Armstrong, Whitworth and Co. Ltd. v. Redford [1920] A.C. 757 (House of Lords) that a worker who had slipped and injured herself as she hurried back to work from a lunch break was entitled to recover. He stated at page 780:

In the present case I say no more than that I think that the girl was in the course of her employment when, in hurrying down the stairs to achieve punctuality in "clocking on", she was endeavouring to comply with the duty of punctuality which she owed to the employer, ...

In a decision of the British Columbia Workers' Compensation Board, Re Unauthorized Activities, Decision No. 230, B.C. W.C.B. Reporter, at page 83, the following principle is set out:

... an act which is done bona fide for the purpose of the employer's business may form part of a worker's employment, even if not specifically authorized by the employer.

Lastly, the Claims Adjudication Branch Procedures Manual, Document Number 33-14-01, Page No. 1, s. 1(c), dated February 23, 1981 describes the following situation as entitling a claimant to benefits:

if the employee is injured on the employer's premises while doing something to get equipment or materials ready for work, that is being done in the interest of the employer.

The Ombudsman concluded his letter with these comments:

In support of these possible conclusions, I wish to point out that the following two basic issues appear to have emerged from the Appeal Board's decision of May 4, 1979: (1) whether the nature of the activity engaged in by the worker - i.e. repairing his skidder - could be considered as forming part of that which the worker was employed to do; and (2) whether his engaging in that activity on a Saturday - the day in which he was not authorized to "work" - would preclude the characterization of that activity as arising out of and in the course of employment.

1. Regarding the first issue of whether the repairs formed part of the complainant's employment, it is reasonable to assume that a mechanical work tool like the skidder would at some point necessitate repairs and that, to enable the complainant to continue the work which he was bound to do, he would have to carry out repairs without which he could not do his work. Given that the skidder, by definition, could not be used for any other purpose than a work-related activity, and that the skidder operator could work for none other than [the lumber company] while in [that company's] employ, it is reasonable to believe that the workman would not otherwise have incurred the risk incident to the act of changing the skidder tire unless engaged in the duty of log cutting owing to [the company]. It would appear that, although the complainant was responsible for his own repairs, he was, in carrying them out, doing something in discharge of his duty to his employer indirectly imposed upon him by his contract of service.

2. Regarding the second issue as to whether the complainant's performance of the skidder repairs on a weekend would remove that activity from the realm of his employment, it could well be argued that, like the worker in the case of Armstrong, Whitworth cited above, the complainant was endeavouring to comply with the duty owing to his employer by arranging to have the tire fixed so that his skidder could be in operation by Monday morning.

Furthermore, as suggested by the Commissioners of the British Columbia Workers' Compensation Board in the above-noted Decision No. 230, not only were the repairs undertaken to advance the employer's business but, although not specifically authorized by the employer, there was no specific reference in the terms of employment concerning the repair of the skidder. The cutters were not allowed to "work", that is - to cut logs, on weekends, but no mention was made of repairs by the employer. The terms of the worker's employment did not prohibit his going into the bush on a Saturday to do something incidental to the employment. Indeed, there could not have been any reason for the employer to have prohibited such repairs on a Saturday, given that the reason for not permitting work on weekends was to allow the employer to carry out maintenance repairs to the roadway. The repairing of skidders, all of which were left parked on the job site, could not be said to interfere with such road repairs.

It could be said, moreover, given that, on principle, cutters were permitted to work at any, and all, hours of the day during weekdays, that it was conceivable that a zealous round-the-clock cutter should only have the weekend to carry out the necessary repairs to his skidder and that the employer would have contemplated that possibility.

The Ombudsman's letter of July 7, 1983, concluded with the following tentative recommendation:

It may be open to me to recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision dated May 4, 1979 and grant the complainant entitlement to a low back disability as arising out of and in the course of his employment on February 19, 1977.

The Chairman responded by letter dated October 14, 1983 stating that:

The Appeal Board is of the view that the case law identified on Page 3 of [the Ombudsman's] letter is not relevant in terms of influencing a decision of the panel. Section 75(1) of the Workers' Compensation Act provides that "The Board has exclusive jurisdiction to examine into, hear, and determine ..." (emphasis added) the matters identified, including a claim for Workers' Compensation benefits. The Appeal Board takes this to mean that its discretion in making such determination ought not to be fettered by court decisions in this and other jurisdictions. Furthermore, Section 80, subsection 1, of the Workers' Compensation Act sets out the principle on which decisions are made, by providing that:

"Section 80.-(1) Any decision of the Board shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent but shall give full opportunity for a hearing".

The Appeal Board takes this as lending support to its views that case law ought not to be a determinative factor in the adjudication process. This, of course, is not to say that there may not be cases where the test applied by the courts happens to be consistent with a test used by the Board in similar circumstances. It does not, however, mean that the Board used the test because it was one used by the court.

With regard for the merits of the complainant's case, the panel notes that your investigation thus far makes no reference to the Claims Adjudication Branch directive of October 15, 1976. For your information, the entire directive is set out below. In addition, I have attached the background memorandum on which it is based.

"Directive 20. Coverage For Persons Who Own Equipment Used To Perform Their Work And Injured While Working On That Equipment.

If the work being done is emergency repairs and the man is in the course of his employment with his employer it would be considered that accident arose out of the employment and entitlement granted. i.e. a machine breaks down in the bush at 2:00 p.m. and the man is busy repairing the machine when the accident occurs at 2:30 in the afternoon.

If accident occurs while the man is performing repairs or maintenance to the machine and the accident takes place while the man is not in the course of his employment, i.e. after hours, no entitlement is granted.

I should point out that this is a directive for the guidance of Claims Adjudicators, rather than a Board approved policy. While the Appeal Board did not consider itself bound by this directive, it agreed with the principle involved and concluded that the complainant was not in the course of his employment when the alleged incident occurred. I should also add that the excerpt quoted on Page 4 of your letter, from the Chaims (sic) Adjudication Branch Procedures Manual, has always been taken to mean equipment or materials owned by the employer. This procedural directive is therefore not inconsistent with Directive 20 quoted earlier.

In view of the foregoing, the Appeal Board cannot agree with your tentative conclusion and will accordingly not implement your tentative recommendation.

Before reaching any final conclusions respecting the complaint, the Temporary Ombudsman carefully noted all of the facts involved as outlined in the Ombudsman's letter of July 7, 1983, as well as the Board's response contained in the Chairman's letter of October 14, 1983.

With respect to the Ombudsman's tentative conclusion that the Appeal Board's decision was based upon a mistake of law, the Temporary Ombudsman did not make this conclusion final as in his view the decision was better considered in terms of its reasonableness. However, the Temporary Ombudsman did wish to point out that he disagreed with the Board's opinion that case law should not be a "determinative factor" in deciding entitlement.

With respect to the tentative conclusion that the Appeal Board's decision was unreasonable, however, the Temporary Ombudsman was of the view that the Board's response did not constitute a significant refutation of the information contained in the Ombudsman's letter of July 7, 1983. In the Temporary Ombudsman's opinion, the Appeal Board's reliance upon Claims Adjudication Branch Directive No. 20, a "Directive For The Guidance Of Claims Adjudicators", rather than a Board approved policy, was unreasonable. In addition, it was the Temporary Ombudsman's view that the Appeal Board should have considered the persuasive value of relevant legal precedent in reaching its decision in the complainant's case.

With respect to the merits of the Claims Adjudication Branch Directive, it is clear that any accident occurring while repairs are being performed to equipment outside normal working hours is non-compensable. This, in the Temporary Ombudsman's view, was overly simplistic, because the issue to be determined is whether the act in question was performed for the benefit of the employer, and not whether it took place within a particular time span.

Accordingly, it was the Temporary Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board, by decision dated May 4, 1979, unreasonably denied the complainant compensation benefits from February 19, 1977 to August 20, 1977 for a low back disability arising out of a compensable accident on February 19, 1977.

It was therefore the Temporary Ombudsman's recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant the complainant entitlement to compensation benefits from February 19, 1977 to August 20, 1977.

The Board did not respond to the Temporary Ombudsman's recommendation, which was contained in a report dated January 30, 1984. The Ombudsman therefore referred the matter to the Premier on March 30, 1984. The complainant was apprised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 14

The complainant registered his complaint against the Workers' Compensation Board with this Office on February 23, 1982. The complainant contended that the Appeal Board, in its decision dated September 15, 1981, was unreasonable in finding that the leg injury sustained on December 21, 1979 did not arise out of and in the course of his employment.

On July 8, 1982, the Chairman of the Workers' Compensation Board was notified of our intention to investigate the complaint, in accordance with the requirements of section 19(1) of the Ombudsman Act. This notice also outlined some of the Board policies which might be relevant to the issue raised by the complainant and asked the Chairman to comment on their applicability.

On behalf of the Chairman, a reply was received from the Assistant Secretary on August 18, 1982. He specifically addressed each of the policies outlined in the section 19(1) notice and commented that as the fact situation in the complaint did not conform to the policies, they were therefore not applicable.

The investigation of this complaint was then assigned to two members of our investigative staff. During this investigation, my investigators conducted a thorough review of the complainant's Workers' Compensation Board claim file which was supplied by the Board. In addition, they obtained further information from the complainant, and carefully considered the relevant legislation, policy and practices of the Workers' Compensation Board in relation to this issue.

The investigation carried out by this Office indicates that the complainant, a bus driver for a public transportation company since 1953, was injured on December 21, 1979 when he was struck by a car. At the time of the accident, the complainant had just completed his shift, and had left his bus to the relief driver. He carried with him the trip report for that shift, and was planning to return to the depot, hand in the report to the dispatcher, pick up his car, and go home. In order to return to the depot, he had to cross the street and board a bus travelling in the opposite direction. Unfortunately, as he crossed the street, the complainant slipped, fell, and was struck by a passing automobile. He suffered a serious compound fracture of both bones in his left leg as well as other minor injuries. He received temporary total benefits for 55 weeks until he returned to work on January 18, 1981.

The employer initiated an appeal claiming the complainant was not injured while in the course of his employment and therefore had no entitlement to collect benefits under section 3(1) of the Workers' Compensation Act. The Claims Review Branch denied the employer's appeal. However, the employer later succeeded before the Appeals Adjudicator and the Appeal Board. The Appeal Board found on September 15, 1981 that the complainant was no longer in the course of employment

at the time of the accident as he was returning to the depot in large part because his car was there and not for the purpose of personally delivering the trip reports.

It was established in the course of the investigation undertaken by our Office that the employer has a Manual which governs procedures to be followed by drivers. Under a section entitled "Trip Reports" the Manual states that the operator or driver is required to maintain an accurate trip report, and to remit this report to the dispatch office daily. The Manual is silent as to the manner in which the trip report is to be returned to the depot. The investigation revealed that most drivers turned trip reports over to the relief driver and the last driver of the day on that bus returned all reports to the dispatcher. However, some of the drivers returned trip reports to the dispatcher personally. The employer had over many years not commented on nor disapproved of either method of remitting trip reports. The complainant had personally returned his trip reports for several years. In fact, on several occasions when he had not brought his car to work, he still returned to the depot to personally remit the trip report. He provided the Appeal Board with testimony to this effect.

During the course of the investigation, the Ombudsman formed the view that,

It would appear that it might be open to me to conclude pursuant to section 22(1)(b) of the Ombudsman Act that the Appeal Board's decision that [the complainant] did not sustain a personal injury by reason of an accident arising out of and in the course of his employment was unreasonable.

In a letter dated May 6, 1983, the Ombudsman advised the Chairman of the Board and the employer of this possible conclusion and consequent recommendation. In support of the possible conclusion and recommendation he pointed out that:

1. The [employer's] manual contains the rules and regulations for bus drivers. Its wording makes it clear that a responsibility is imposed on each bus driver to ensure that his trip reports are handed in daily to the dispatcher. It does not specify any particular manner in which this duty should or should not be performed.
2. [The complainant]'s established practice had been to hand in his trip reports personally to the dispatcher. His method of performing the duty imposed by the company was never forbidden or disapproved of by [the employer].
3. [The complainant]'s actions in personally delivering his trip reports were technically correct and moreover were in the best interest of his employer, [the employer].
4. The employer stated that [the complainant] was not doing anything wrong by handing in his trip reports personally to the dispatcher.

Therefore the method chosen by [the complainant] to perform a duty of his employment did not constitute a distinct departure on a personal errand and did not take him out of the course of his employment at the time of his accident, even though this method of performing his duty

also returned him to the place where he had parked his car. Merely because an employee chooses to perform a work duty in a manner which is convenient to him personally, does not take him out of the course of his employment. To maintain that the duty is not to hand in one's reports personally, but merely to see that they are handed in, and that therefore handing them in personally takes one out of the scope of his employment, is to define employment too narrowly.

The letter of May 6, 1983 went on to state that:

It would appear that it might be open to me to recommend, pursuant to section 22(3)(g) of the Ombudsman Act that the Appeal Board revoke its decision and restore to [the complainant] entitlement to benefits for the broken leg he suffered on December 21, 1979.

The Chairman, in his response to our letter of May 6, 1983, stated that the Board remained of the view that the complainant was performing a personal errand at the time of the accident and that the Board was convinced it had applied the correct test in arriving at this conclusion. He went on to state that the test in question was first used in a New York case, Marks' Dependents v. Gray 251 N.Y. 90, 167 N.E. 181 (1929). He quoted a portion of this decision in his letter. The quotation would indicate that, according to that decision, where an employee is travelling both on a personal errand and an errand for his employer, if the trip would have taken place whether or not the business purpose existed, then the travel is personal in nature and therefore not within the scope of employment. In addition, the Chairman relied upon the written decision of the Appeals Adjudicator in this matter where the Adjudicator noted that a Board investigator had been told by the complainant that had it not been for the fact that his car was parked at the depot, he would have handed in his trip reports to the relief driver.

The employer also responded to our letter of May 6, 1983. The employer argued that while the complainant had claimed to have a habit of personally returning his trip reports to the dispatcher, on specific dates in August, 1981 and May and June, 1983, he did not do so. Additionally, the employer expressed concern that a decision favourable to the complainant would broaden the scope of employment to include drivers on split shifts during the time between shifts.

Upon receipt of the letters from the employer and the Chairman of the Board, further information was obtained from the complainant. He stated that after his accident, having been told by his employer during Workers' Compensation Board appeals that the usual practice was to leave such reports with the relief driver, he himself commenced to do so. The practice therefore changed after his accident, in part due to the statements made by the employer to the Board. The complainant also advised upon questioning that he had to commence his work day at the yard as he took a fresh bus out of the garage. For this reason, his car had to be parked near the depot.

Further investigation was also conducted into the Chairman's contention that the complainant had advised a Board investigator that he would not have returned to the depot had it not been for the fact that his car was parked there. Upon examination of the Board files it became clear that an investigator had recorded in a memorandum dated September 11, 1980 that he had interviewed the complainant. The memorandum indicated that, upon questioning, the complainant

stated that when he had previously worked on a different route, he would not have returned to the yard unless his car was parked there. Upon further questioning by the investigator from our Office, the complainant stated that his habit for the past number of years had been to return to the depot to remit the reports to dispatch whether or not his car was parked there, and that on several occasions when he had taken a bus to work, he had still personally remitted his reports.

The New York case referred to by the Chairman in his response to our letter of May 6, 1983 was researched and updated by members of our staff. In addition, research was undertaken into Canadian jurisprudence with respect to the scope of employment in similar cases. This research indicates Judge Cardozo stated in his decision in Marks' Dependents v. Gray that the employee would remain within the scope of employment if a business purpose was at least the concurrent cause for the journey in question. This decision was re-examined by subsequent New York courts. For example, in Skinner v. Tobin Packing Co. 233 N.Y.S. 2d 900 (1962), a decision of the New York Superior Court it was held that it was debatable whether Marks' Dependents v. Gray established a dominant purpose test. The employee in the Skinner case was killed while travelling to his home and sales territory in Kingston from Albany where his pregnant wife sometimes spent weekends. The employee also had some collections and orders at the employer's plant in Albany. The court held that the applicable test should be whether the journey in question had a business purpose concurrent to the personal purpose. Where such a business purpose existed, the employee remained within the scope of employment and there was no need to establish whether the business purpose was a dominant cause of the journey.

An examination of the Canadian case law would indicate that an employee remains within the scope of employment so long as he performs a task reasonably incidental to his work. For example, in Betts and Gallant v. The Workmen's Compensation Board, [1934] S.C.R. 107, the Supreme Court of Canada held that an injury to an employee may occur within the scope of employment so long as he does something which is reasonably incidental to the contract of employment. Another decision of the New Brunswick Court of Appeal held that even where employees are not performing duties within the normal range of their employment but they are nevertheless furthering the employer's business, they remain within the scope of employment (Re Kinney and Workmen's Compensation Board (1972) 27 D.L.R. (3d) 703 (N.B.C.A.)). Canadian case law clearly indicates that only a limited connection with employment is necessary in order to bring an employee within the scope of employment.

Before reaching a final conclusion in this case, the Temporary Ombudsman again carefully considered all of the factors involved including those outlined in the letter of May 6, 1983, the responses from the Workers' Compensation Board and the employer, and the additional information obtained by our Office.

The Temporary Ombudsman was of the view that the responses forwarded by the Chairman and the accident employer do not provide sufficient reasons which would cause him to alter the possible conclusion and subsequent possible recommendation as outlined in the Ombudsman's letter of May 6, 1983.

The Temporary Ombudsman noted that the employer held each driver personally responsible for the return of trip reports to the dispatch office. For several years prior to the accident, the complainant had been in the habit of personally delivering his reports to the dispatch office. He noted further that

the complainant had changed his habit since the employer appealed the Workers' Compensation Board decision to grant benefits. The employer in this instance developed the policy with respect to the driver's personal responsibility for the remittance of trip reports. However, the employer did not outline any required method for fulfilling the policy. In fact, it condoned two different methods over many years, one of which extended the time during which the employee remained within the scope of employment. After having condoned this particular method of remitting trip reports for a number of years, the employer cannot later argue that the employee was not within the scope of employment while performing this task.

The Temporary Ombudsman noted further that an examination of the case law in this area reveals that so long as a business purpose is reasonably incidental to the activities undertaken by a worker at the time he is injured, he comes within the scope of employment. As this area of the law has been extensively considered by Canadian jurisprudence, he was not persuaded by the Board's submission of case law from another jurisdiction, especially in view of later decisions which have modified the views therein expressed.

Finally, the Temporary Ombudsman did not share the concerns of the employer in this matter that a favourable decision to the complainant would bring other drivers within the scope of employment during the period between shifts when they are working a split shift. The Temporary Ombudsman was of the view that should this issue arise in such an instance, the activities of the driver at the time would have to be examined to establish whether or not he was in fact undertaking a specific task for the employer. A decision with respect to the complaint is specific to the particular facts of his case.

It was therefore the Temporary Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act that the Appeal Board decision of September 15, 1981 was unreasonable in failing to find that the complainant's accident arose out of and in the course of employment pursuant to section 3(1) of the Workers' Compensation Act. The Board failed to give adequate weight to the fact that the complainant was at the time returning his trip report to the depot, a duty required of him by his employer. The Board at the same time gave undue weight to the fact that the complainant also had to return to the depot in order to get his car. In the Temporary Ombudsman's view, the concurrent business purpose for the trip was not negated by the personal purpose and therefore the complainant was in the course of his employment at the time of the accident.

It was therefore the Temporary Ombudsman's recommendation, pursuant to section 23(3)(g) of the Ombudsman Act that the Appeal Board revoke its decision and restore to the complainant entitlement to benefits for the broken leg he suffered on December 21, 1979.

The Board was notified of the Ombudsman's opinion and recommendation in a report dated December 7, 1983. On February 24, 1984, the Chairman responded on behalf of the Board. He advised that the Board continues to adhere to the view that the scope of employment had not been extended simply because the complainant was returning trip reports. He also stated that in the Board's view, the duty to return trip reports extended only to the first reasonable opportunity to return them, and that otherwise the scope of employment would be unreasonably broadened.

The Ombudsman carefully reviewed the Chairman's response and found that the Board had not provided him with any additional reasons which would cause him to alter the opinion and recommendation in this case. He therefore exercised his

discretion under section 22(4) of the Ombudsman Act and referred the matter to the Premier on March 30, 1984. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 15

The complainant registered his complaint against the Workers' Compensation Board during an interview at our Office in Toronto on October 18, 1982. The complainant advised that he was dissatisfied with an Appeal Board decision dated October 24, 1978 which concluded that he was not entitled to the payment of temporary total compensation benefits for the period extending from February 9, 1977 to November 4, 1977.

On November 1, 1982, the Chairman of the Workers' Compensation Board was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. He was asked if he wished to provide a statement of the Board's position. A response was received by our Office in which the Board indicated it did not wish to make a statement at that time. Our file on this complaint was assigned to a member of our investigative staff. He thoroughly reviewed the Workers' Compensation Board claim file related to this complaint, as well as carefully considering the relevant legislation, policy and practices of the Workers' Compensation Board.

The investigation carried out by our Office has revealed that on October 29, 1976 the complainant, a co-owner of a construction company in a town in Ontario, lifted a heavy jack and felt pain in his low back. Three days later, he was examined by his family doctor, Dr. A., whose diagnosis was "lumbosacral strain". A claim was submitted to the Workers' Compensation Board and the complainant received temporary total disability benefits from November 1, 1976 until February 9, 1977, when an orthopaedic specialist, Dr. B., who examined him once on February 1, 1977, indicated that he could return to work. Dr. B. noted, "I made a diagnosis of a resolved lumbosacral strain and in my opinion he is fit to return to his duties."

On April 6, 1977, Dr. A. noted:

... in my opinion his type of work is too heavy for his physique. I don't think physically he is strong enough for this type of work yet. He is fit for light work and is improving and could try his own work in another week or so.

On May 10, 1977, the complainant was examined at the Board to clarify the situation arising out of the contradictory reports from Dr. B. and Dr. A. One of the Board Surgical Consultants, Dr. C., and one of the Board Medical Officers, Dr. D., conducted the examination. Dr. D. concluded,

After an examination by Dr. C. and myself no physical disability was found that would prevent this man from doing his regular work. The claim should be adjudicated following the reports of Dr. B. and Dr. A. which say he can do his usual work also.

On the same day, the complainant was examined by another orthopaedic specialist, Dr. E., who concluded, "... he is suffering from an extruded intervertebral disc." Subsequently, the Board granted the complainant temporary partial disability benefits from February 9, 1977 until May 11, 1977. Benefits appear to have been paid up until the time the complainant was examined by the Board's doctors on May 10, 1977.

In May, 1977, the complainant underwent non-compensable surgery. On the day of his admission to the hospital for this surgery, the complainant began physiotherapy treatments for his back. After a brief interruption for the surgery, the therapy treatments continued regularly from June 7, 1977 until July 5, 1977.

On July 5, 1977, the complainant was examined by a neurosurgeon, Dr. F., who concluded,

The complainant may well have some degenerative lumbar disc disease. However, he also has an anxiety neurosis. I would suggest that he be admitted to the Compensation Board Hospital and that he be observed and investigated there.

Neither the complainant nor Dr. F. were notified of any action contemplated by the Board concerning Dr. F.'s request. On September 15, 1977, Dr. F.'s secretary wrote to the Workers' Compensation Board to inquire whether or not the Board would be admitting the complainant to the Hospital and Rehabilitation Centre in Downsview as suggested by Dr. F. This letter prompted the admission of the complainant to the Centre on November 4, 1977. Temporary total disability benefits were restored from November 4, 1977 until November 18, 1977, the day the complainant was discharged from the Downsview Centre. The complainant was to return for orthopaedic and psychiatric assessments. The discharging doctor, Dr. D., noted, "This man has been discharged to return to his regular work on December 7, 1977 unless this is contraindicated following his assessments by Dr. G. and Dr. H. on November 30, 1977."

After his assessment on November 30, 1977, Dr. H., a neuropsychiatrist, concluded,

... He should be encouraged to return to a gainful occupation despite persisting symptoms, perhaps under somewhat modified working conditions to start with. I do not believe that he would be a proper candidate for formal psychotherapy. The prognosis appears guarded, but could be improved if the complainant could be persuaded to return to work and stick it out, despite persisting symptoms.

Dr. G., an orthopaedic consultant, concluded,

... he is quite fit to undertake many types of light to modified work.... I recommend very strongly that he attempt to find this kind of work and keep himself active and after a time he may ultimately be able to get back to doing his former job.

Subsequent to his discharge, the complainant received temporary total disability benefits from November 18, 1977 until his return to self-employed work on June 5, 1978. These benefits were paid pursuant to section 41(1)(b) of the

Act. At the direction of the Appeal Board, the complainant was assessed for a permanent disability pension in December, 1978 and awarded a 10% pension.

The Appeal Board decision, dated October 24, 1978, noted,

... Subsequently after a hearing before the Appeals Adjudicator, it was recommended that the complainant be admitted to the Hospital and Rehabilitation Centre for a complete assessment. Following receipt of the discharge report from the Hospital and Rehabilitation Centre, the Appeals Adjudicator concluded in a decision dated March twenty-first, 1978 that the complainant was not entitled to additional compensation benefits subsequent to February ninth, 1977.

Upon our review of the Board claim file, it would appear that in fact the complainant was not admitted to the Centre subsequent to the Appeals Adjudicator hearing. Rather, his file was reviewed by Dr. I., a Psychiatric Consultant, on March 8, 1978. Dr. I. noted,

The two above opinions [Dr. H. and Dr. G.] concur that the patient should be able to try a modified employment, except under the present circumstances, perhaps with the language barrier he will have a rather hard time to find employment.

The Appeal Board decision also noted, "... the records of hospitalization [May, 1977] make no reference to any continuing back disability." The complainant was hospitalized for an "anal abscess" and no reference was made to his back at all. The Temporary Ombudsman did note, however, that the complainant received physiotherapy treatments 17 times in June, 1977 subsequent to his discharge from the hospital.

The Appeal Board decision concluded,

... The Appeal Board finds that the examination of May tenth, 1977 indicated clearly that the complainant was able to return to his regular work. The Appeal Board further finds that the subsequent reports do not establish a continuing compensable disability, during the period in question which prevented the complainant from returning to employment.

I agree that the examination by the Board's medical staff on May 10, 1977 indicated that the complainant could return to his regular work. However, it would appear that subsequent reports establish a continuing compensable disability during the period in question which prevented the complainant from returning to regular employment.

During the course of my investigation, the Temporary Ombudsman formed the view that it might be open to him to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board was unreasonable to conclude that the complainant was not entitled to temporary partial benefits for the period from May 11, 1977 to November 4, 1977.

In a letter dated October 20, 1983, the Temporary Ombudsman advised the Chairman of this possible conclusion and his possible recommendation. In support of the possible conclusion and recommendation, the Temporary Ombudsman noted,

At this stage of our investigation, I am of the tentative view that the Board's decision was not unreasonable to deny the complainant's claim for temporary total disability benefits. However, the Board may have been unreasonable not to have granted the complainant entitlement to temporary partial benefits for the entire period from February 9, 1977 to November 4, 1977. As the complainant did receive temporary partial benefits from February 9, 1977 until May 11, 1977, this letter will focus on the complainant's entitlement to temporary partial disability benefits from May 12, 1977 until November 4, 1977.

In support of this possible conclusion, the Temporary Ombudsman's letter of October 20, 1983 further noted,

... I have noted that the complainant was in receipt of temporary disability benefits from the date of the accident until May 11, 1977 and again from November 4, 1977 until June 5, 1978 when he returned to work. There is no indication on the file that the complainant suffered a recurrence or further exacerbation of his symptoms to account for the payment of further benefits beyond November 4, 1977. Following his discharge from the Board's Centre I also note that the Board's medical advisors (Dr. H. and Dr. G.) recommended a return to modified employment. These recommendations and opinions appear to have been accepted by the Board given the payment of additional benefits. The doctors appear to indicate the complainant had not returned to his pre-accident state and was not capable of returning to his pre-accident employment. This assumption is further supported by the Board's decision to grant the complainant an award in recognition of a permanent disability.

Also before the Board at the time of its decision was the evidence of Dr. A. and Dr. E. which supported the complainant's claim that he was continuing to suffer from a disability related to his accident. Dr. E.'s opinion was supported by findings of limitations of flexion and extension. I also note that Dr. E. referred the complainant for physiotherapy treatments from May 24, 1977 until July 5, 1977.

His letter, dated October 20, 1983, to the Chairman, concluded,

It would appear that it may be open to me to recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and award the complainant temporary partial benefits for the period May 12, 1977 to November 4, 1977.

On November 17, 1983, the Chairman responded,

Your letter of October 20, 1983 suggests the panel should have awarded benefits on the basis of partial disability, and that its failure to do so, was unreasonable. In the Appeal Board's view, the issue of entitlement for temporary partial disability benefits was not addressed at the hearing. Furthermore, the complainant has made no complaint in this regard despite the fact that this very issue was addressed by the Claims Review Branch in its letter of October 1, 1979. In fact, although he was informed of his right to appeal the Review Branch decision, the complainant has not done so.

While section 15(2) of the Ombudsman Act indicates the Ombudsman may investigate in the absence of a complaint, section 15(4) (a) clearly provides that such investigation may only be done where no further right of appeal or objection, etc. exists.

Under the circumstances, the Appeal Board considers it inappropriate to respond to your tentative conclusion and recommendation, and accordingly, the Appeal Board will not make a response thereto.

In reply to the Chairman, on January 9, 1984, the Temporary Ombudsman wrote,

I continue to be of the view that the Appeal Board should have considered entitlement to any benefits that may have been owing to the complainant for the period under consideration.

In a letter dated January 20, 1984, the Chairman stated,

For the reasons set forth in my letter of November 17, 1983 the Appeal Board has declined to offer any comment in respect of the issue of entitlement to benefits under section 41 of the Workers' Compensation Act, in this matter.

Before reaching a final conclusion in this case, the Temporary Ombudsman again carefully considered all of the factors involved, as outlined in his letter of October 20, 1983, and reflected upon the Board's response to that letter and the lack of representations to his tentative conclusion and recommendation contained in that letter.

The Temporary Ombudsman was of the view that the Board's failure to address the merits of his possible conclusion and recommendation was inappropriate. The Board has the authority not only to consider the evidence before it, but also to make inquiries, summon witnesses and inspect premises. When the complainant appeared before the Appeal Board, he was requesting additional entitlement to benefits for the limited time period from February 9, 1977 to November 4, 1977. The Temporary Ombudsman regretted for the complainant's sake that the Board took an overly technical approach in dealing with his case. All the relevant facts were before it. The Board has a statutory mandate to consider the case before it on its true merits and justice. It was the Temporary Ombudsman's view, therefore, that the Board should have considered and inquired into any entitlement possible for the complainant during the time period under consideration.

In his letter of November 17, 1983, the Chairman of the Board referred to section 15(4) (a) of the Ombudsman Act which provides that the Ombudsman may not investigate a complaint if the complainant has a statutory right of appeal or objection or the statutory right to apply for a hearing or review, until the right has been exercised or the time to exercise the right has expired.

Our understanding of the Workers' Compensation Board's current procedure is that an appeal to the Appeal Board is a matter of procedure pursuant to section 74 of the Workers' Compensation Act. Under the current procedure at the Board, a worker has no statutory right to an appeal; in other words, there is no specific statutory provision that the complainant can point to and say it entitles him to

an appeal on the point in issue. Although the Workers' Compensation Board may procedurally grant the complainant the right to appeal, the Ombudsman's jurisdiction under section 15(4)(a) is predicated on the statutory remedies provided by the Workers' Compensation Act, not on the Board's administrative procedures. Therefore, the Temporary Ombudsman was of the opinion that the Temporary Ombudsman was not prohibited from investigating the complaint. Certainly, in the normal course of events, the Temporary Ombudsman would exercise his discretion and not investigate a complaint until the complainant had appealed to the Appeal Board. In this case, for the reasons given above, the Temporary Ombudsman decided not to exercise his discretion to discontinue this investigation.

The Temporary Ombudsman was therefore of the view that the possible conclusion and recommendation were appropriate. In the absence of any comments from the Board on the merits of the case, the Temporary Ombudsman confirmed his position.

Accordingly, it was the Temporary Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board was unreasonable to conclude that the complainant was not entitled to temporary partial benefits for the period from May 12, 1977 to November 4, 1977.

It was the Temporary Ombudsman's recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and award the complainant temporary partial benefits for the period May 12, 1977 to November 4, 1977.

This recommendation was included in a report to the Chairman dated February 16, 1984.

The Board had not responded to the report and recommendation by March 30, 1984. The Ombudsman therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 16

The complainant approached this Office on May 12, 1982 with a complaint against a decision of the Appeal Board of the Workers' Compensation Board dated April 30, 1982. The complainant contended that the Appeal Board was unreasonable in concluding that it had not been established that his recurrence of back disability on October 7, 1976 was related to his industrial accident of August 18, 1975.

On May 26, 1982, the Chairman of the Workers' Compensation Board, was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. He was invited to make a statement of the Board's position on the complainant's claim.

On June 4, 1982, the Assistant Secretary of the Board responded on the Chairman's behalf, stating that the Board did not wish to make a statement at that time.

This complaint was assigned to a member of our investigative staff. She thoroughly reviewed the complainant's Workers' Compensation Board claim file supplied by the Board, and considered the relevant legislation and Board policy and practice in relation to the issue.

The investigation into the complaint revealed that on August 18, 1975, he sustained a compensable back injury when he slipped from a platform while in the process of washing a car. The complainant was employed as an assembler by an auto manufacturer. A lumbosacral strain superimposed on a pre-accident back condition was diagnosed. Compensation benefits were granted from August 18, 1975 to November 5, 1975, when the complainant returned to work.

The claim was accepted on an aggravation basis, recognizing that on October 31, 1968, the complainant had sustained a compressed L1 vertebrae as a result of a car accident. Surgery in the form of a laminectomy and fusion was performed.

In September of 1972, the complainant had a second car accident. A ruptured disc was eventually diagnosed and on December 13, 1972, the complainant underwent a lumbar laminectomy. He made a satisfactory recovery from this surgery and returned to work a few months later.

The complainant's back appears to have remained stable until his compensable back injury of August 18, 1975. Although he returned to work on November 5, 1975, the complainant contended that his back condition remained symptomatic.

On October 6, 1976, the complainant stopped working again due to back and leg pain which appeared without any further specific accident. Prior to this layoff, the complainant had been assigned to a job which required him to do considerably more bending than his previous duties. A ruptured disc at L5 with nerve root irritation was diagnosed and on August 11, 1977, surgery in the form of a laminectomy at the L4-5 and L5-S1 level was undertaken.

The complainant applied for compensation benefits on the basis that his 1976 layoff and subsequent surgery of 1977 were related to his compensable accident of August 18, 1975. He was denied benefits as the Workers' Compensation Board concluded that the complainant's problems were not related to his compensable injury, but rather to his non-compensable pre-existing back problems.

This issue became the subject of an investigation by this Office into an earlier Appeal Board decision dated July 20, 1977. At various stages in the investigation, this Office submitted to the Workers' Compensation Board information which may have caused the Board to reconsider the complainant's case. The Board declined to reconsider its position and on April 2, 1980, a letter pursuant to section 19(3) of the Ombudsman Act was sent to the Board by the Ombudsman. In that letter, he advised the Board that it was his tentative opinion that the Appeal Board was unreasonable in not fully considering the available information. He accordingly made the tentative recommendation that the Appeal Board revoke its decision and grant entitlement.

In his response dated May 20, 1980, the then Chairman of the Workers' Compensation Board, advised the Ombudsman that the Board would not implement his tentative recommendation. The Board was of the opinion that it had given

sufficient consideration to all the evidence, and could not agree that its decision was unreasonable. The then Chairman also stated that, since in the opinion of the Appeal Board the evidence for and against establishing a relationship was not approximately equal in weight, the policy of Benefit of Doubt did not apply.

After further submission of evidence by this office to the Board and discussion of the matter between the Ombudsman and Board officials, the Board granted the complainant a reconsideration of its previous decision under section 76 of the Workers' Compensation Act. This was outlined in a decision dated May 26, 1981. At that time, the complainant withdrew his original complaint with this office pending the results of the rehearing.

The new evidence which had been submitted to the Board is as follows in its entirety. The reports of:

1. Dr. A., orthopaedic specialist, October 18, 1978:

In my opinion, his present symptoms are directly related to the accident of August 18th, 1975...

There is no doubt that a man with his history of back problems would have difficulty with job duties that require bending, walking and lifting. However, these movements would aggravate both the pre-existing non-compensable conditions as well as the pre-existing compensable conditions equally. The fact that he had complete recovery following the lumbar laminectomy of 1972 makes it more likely that the job duties aggravated the new development of degenerative disc disease with accompanying right leg pain which began after the accident at work on August 18th, 1975.

2. Dr. B., orthopaedic specialist, June 8, 1979:

Obviously this is a very difficult question to be dogmatic about, however in my opinion it would appear that if [the complainant]'s symptoms could be attributed to one specific injury, it would appear in my opinion they are most likely related to injury in August of 1975.

3. Dr. A., orthopaedic specialist, October 6, 1980:

In my opinion, this man's 1976 layoff from work was directly related to the compensable accident of August 1975, which aggravated a pre-existing condition, causing a recurrence of right leg pain.

The injury at work aggravated and made symptomatic a pre-existing but quiescent problem, originally associated with a previous motor vehicle accident.

I am unable to state definitely whether or not the eventual layoff from work had any relationship to the change in work duties one month prior to the layoff in October 1976.

Therefore, the 1976 layoff was directly related to the work associated injury of August 1975, which in turn, aggravated and made symptomatic a

pre-existing but asymptomatic condition (degenerative disc disease of the lumbar spine).

4. Dr. C., orthopaedic specialist, December 1, 1980:

You requested whether this patient's present disability was related to his compensable problem. It is my feeling that it is.

The Board's surgical consultants did not agree that the complainant's layoff of 1976 bore any relationship to his 1975 compensable accident. The Board's position was expressed by Dr. D. in a memo dated November 22, 1978 as follows:

The basic problem in this claim is one of degenerative disc disease. From a pathological point of view, degenerative disc disease is universal in the human race by the time age 30 is reached. From a clinical point of view it is an extremely common problem, both occurring under compensable circumstances and non-compensable circumstances. Basically it is a product of an individual's heredity, his increasing age, and past stressful incidents, both compensable and non-compensable. Without any question all these causative factors contribute to any degenerative problem being considered for compensation purposes. The distinction that we are forced to make into compensable and non-compensable degenerative disc problems has no existence in nature, it is one that is forced upon us by the fact that we administer the provisions of the Act. In many low back cases being considered as a compensable matter, we have to balance the sequelae of non-compensable incidents against the sequelae of compensable ones in trying to determine whether or not an individual problem can reasonably be accepted as a compensable matter. In a large number of such cases, the decision required is a marginal one and competent people could easily express opposing opinions. In a small number of such cases I cannot regard it as a marginal matter and the case of [the complainant] falls into this smaller group of cases. In my opinion the information on this file, the same information as is available to Dr. A., is very markedly in favour of this man's problems subsequent to the 7th of October, 1976 being to a very large extent the sequel of his non-compensable problems. I personally would support the decisions that we have made in this case quite strongly.

The file was also reviewed by Dr. E. of the Board who expressed the following opinion in a memo dated September 18, 1981:

Subsequently there was no doubt that the patient's spine was very vulnerable and this was demonstrated by his further accident at work. It is interesting to note that his time off work for his compensable accident was indeed relatively short. The spontaneous onset of further pain almost a year later would not be unexpected and despite further surgery, it is to be noted that Dr. B. has demonstrated that the patient continued to have an organic problem in the lower lumbar spine. I would think on the basis of his investigations, the patient would be a candidate for a further spinal fusion.

I have also reviewed the new medical documentation and the transcript.

I do not see any new evidence to reverse the opinion previously expressed by Dr. D.

On July 22, 1981, the complainant appeared before the Commissioners of the Board. Prior to rendering a decision, the panel decided to refer the matter to a Medical Referee, Dr. F., orthopaedic specialist, notwithstanding the opinions of the three independent specialists. Upon receipt of the Medical Referee's report, the Appeal Board deemed the report to be conclusive pursuant to the provisions of section 22(2) of the Workers' Compensation Act and, on this basis, denied the complainant's appeal for benefits subsequent to October 7, 1976. This decision was issued on April 30, 1982. The complainant approached this Office again and requested that we investigate this later decision.

The file was reopened on May 2, 1982 and on May 26, 1982, the Chairman of the Workers' Compensation Board, was notified, in accordance with the Ombudsman Act, of our intention to investigate the complaint which was summarized as follows:

That the Appeal Board in its decision dated April 30, 1982 was unreasonable to conclude that it had not been established that [the complainant]'s recurrence of back disability on October 7, 1976 was related to his industrial accident of August 18, 1975.

Although [the complainant] has taken note of the opinion rendered by Dr. F., the Board-appointed referee, [the complainant] is of the opinion that the Appeal Board was unreasonable to accept this opinion over the opinions of the other three orthopaedic specialist who had supported his contention.

On June 4, 1982, the Assistant Secretary of the Board responded on the Chairman's behalf by stating that the Board did not wish to make a statement at that time.

The investigation into the complaint took into consideration all the evidence on file relating to the issue of entitlement, including the Medical Referee's report, dated March 10, 1982, which reads as follows, in part:

...I think the most probable cause of this patient's current low back and leg disability is the motor vehicle accident described in 1972. The record indicates that this was a significant injury which required hospitalization and an injury at which time the patient began to complain of pain in his low back and right leg radiation. The patient was totally disabled from September 1972 at the time of the accident and eventually required surgical treatment in January 1973. While the patient does have left leg symptoms at the present time it is quite clear from review of the records that the major leg symptoms have been on the right side and that this has been the case from the beginning in 1972.

I think it is reasonable to accept the aggravation of the patient's back problems in 1975, however, on review of the total sequence of events in this patient's back history, I think it is far more likely that the initiating pathology occurred at the time of a vehicle accident in 1972.

During the course of this Office's investigation, the Ombudsman reached the tentative conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that "it was unreasonable for the Appeal Board not to have directed otherwise than that the Medical Referee's report was conclusive and thereby to have denied the complainant entitlement to benefits on this basis alone, notwithstanding the other evidence before it."

The Ombudsman advised the Chairman of the Board and the accident employer of his possible conclusion and recommendation in a letter dated April 21, 1983. The Ombudsman pointed out:

As you are aware, the findings of a Medical Referee carry significant weight in the Board's decision-making process. It is therefore very important that if the report is to be deemed conclusive it must be clear in respect to the issues certified.

The Board, recognizing the significance of clarity in Medical Referee's reports, developed the following directives:

(b) The order of reference is to set out the specific matters on which the Medical Referee's opinion is required such as: the employee's condition at the time of the examination, the diagnosis, the causal relationship of the employee's condition to the reported accident or industrial disease, and in non-fatal claims, whether the employee is fit for employment, and where fit, the work limitations, if any.

. . . .

(e) The employee is to be advised that the Medical Referee's opinion as to the matters certified is to be conclusive and to be the basis of the Board's adjudication.

In its letter to Dr. F., the Board advised him that the issue before the Panel was entitlement to benefits for a recurrence of [the complainant]'s back problem on October 7, 1976 as it related to his accident in 1975. No specific questions were directed to Dr. F. Since the proper questions to be addressed were not supplied to the Referee, it is understandable that the report might have failed to clearly address the issues.

Having received and reviewed the Referee's reply, I would not agree with the Appeal Board's decision that the report is conclusive as to the issue at hand. It appears to me that Dr. F. does not specifically address the cause of the 1976 back disability and subsequent layoff.

In his response dated March 10, 1982, Dr. F. indicated that the probable cause of the current problem, presumably the 1982 problem, was the 1972 motor vehicle accident. He also advised the Board that the initiating pathology was the 1972 accident.

In my opinion the necessary clarity concerning the probable cause of the 1976 layoff is missing and therefore it was unreasonable for the Board to have directed that the report be considered conclusive.

On the other hand, the other reports available specifically relate the 1976 layoff to the 1975 work incident.

The Ombudsman tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act, "that the Appeal Board revoke its decision of April 30, 1982, in which it concluded that the Medical Referee's report was conclusive and grant entitlement on the basis of all the evidence before it."

In a letter dated May 12, 1983, the Ombudsman received submissions to his section 19(3) letter from the accident employer. The following comments, in part, were offered with reference to the Ombudsman's tentative conclusion and recommendation:

In our opinion it would seem to be a very drastic and extreme measure to recommend a complete reversal of a decision based on a lack of clarity by the Medical Referee. Rather, it would seem more appropriate to either suggest that Dr. F.'s statement be explained or that another medical examination be conducted, with specific instructions provided, to avoid this type of confusion.

The Chairman responded in a letter dated May 16, 1983. He indicated in his response that the Appeal Board did not agree that Dr. F.'s report "failed to clearly address the issues". He went on to comment that the panel was satisfied that Dr. F. understood the issue to be a claim "for further entitlement for a recurrence of his low back problem of October 7, 1976", as related to the industrial accident of August 18, 1975.

The Chairman's letter went on to state the following:

In his report of March 10, 1981, Dr. F. clearly, in the panel's view, addresses his issue when he states:

I think the most probable cause of his patient's current low back and leg disability is the motor vehicle accident described in 1972.

The panel might agree that the use of the word "current" might have obscured the issue, had Dr. F. not gone on to say:

While the patient does have left leg symptoms at the present time it is quite clear from review of the records that the major leg symptoms have been on the right side and that this has been the case from the beginning in 1972.

In other words, the panel was satisfied that the condition found by Dr. F. in 1982 and referred to as "current", was essentially no different from that which disabled [the complainant] in October of 1976. In the panel's view, the conclusiveness of Dr. F.'s report was further enhanced by this concluding comment:

I think it is far more likely that the initiating pathology occurred at the time of a vehicle accident in 1972.

While appreciating that for the Ombudsman the report may not have been conclusive, the Appeal Board cannot agree that, for its own purposes,

the report was not conclusive. Accordingly the panel disagrees with your tentative views.

Turning now to your tentative recommendation, the Appeal Board is concerned that, even if your tentative conclusion were accepted, your tentative recommendation would not be an appropriate remedy....

All of the foregoing notwithstanding, the Appeal Board has significant concern relative to the manner in which the appeal proceeded after the hearing. The panel notes that both [the complainant], his representative and the employer were initially told that they would be given an opportunity to review Dr. F.'s report and to make submissions thereon. This offer was subsequently withdrawn on the grounds that submissions would not be appropriate as the report was conclusive.

The panel agrees in retrospect that it would have been appropriate to receive submissions on the report and on the issue of its conclusiveness, before having deemed it conclusive and rendering a decision. Accordingly, it is the Appeal Board's intention to offer [the complainant] and his representative, as well as the employer, an opportunity to make submissions either in person or in writing, with respect to Dr. F.'s report. Should these further submissions demonstrate to the panel satisfaction [sic], deficiencies in Dr. F.'s report sufficient to render it inconclusive, the panel will have the option of either requesting a clarifying opinion from Dr. F., appointing a new Medical Referee, or any other action it considers appropriate under these circumstances.

The Appeal Board would appreciate knowing whether the contemplated action will serve to resolve [the complainant]'s complaint to your office, before proceeding further.

In response to the Chairman's proposal, the Ombudsman replied with the following in a letter dated July 7, 1983:

Your proposed course of action as outlined in the second-last paragraph of your letter, would not, in my opinion, necessarily resolve [the complainant]'s complaint with my Office.

However, I am prepared to await your implementation and final results of these actions before reaching a conclusion on whether you have addressed the possible conclusion and possible recommendation as outlined in my letter of April 21, 1983 pursuant to section 19(3) of the Ombudsman Act.

I will await your further communication.

On November 10, 1983, this Office received an Appeal Board decision dated November 2, 1983, which indicated the following:

The Appeal Board has now had an opportunity to review the submissions filed by [the complainant's representative] on August 18, 1983 and the submissions filed by [the complainant's M.P.P.] and received by the Board on October 27, 1983, on behalf of [the complainant] and the submissions of [the employer's representative] dated August 26, 1983, filed on behalf of [the accident employer].

The Appeal Board concludes that these submissions would not cause the Appeal Board to vary, amend or revoke its decision of April 30, 1982, or to grant a new hearing.

After receipt of the above decision, our investigation into the April 30, 1982 decision continued. The submissions of the employer's and employee's representatives and the complainant's M.P.P. were reviewed as information related to the issue under investigation.

The employee's representative stated the following in a letter dated August 18, 1983:

For the Board to accept Dr. F.'s report and opinion and deny the claim and to disregard a number of well-known and respected specialists' opinions and reports, leads one to question the fairness of the medical evidence submitted being taken into consideration. I personally believe that [the complainant] has followed every directive by the Board and he has medical evidence showing a direct relationship to his industrial accident of 1975.

If there is any benefit of the doubt, we respectfully request that [the complainant]'s claim be allowed.

The submission by the complainant's M.P.P., a copy of which was received at my Office on October 26, 1983, stated the following:

The Board's decision must be based on a review of all medical evidence in the file. Before they appointed a Referee, the evidence overwhelmingly supported [the complainant]'s claim, and even with Dr. F.'s report, the medical evidence on file still favours him on balance. Even Dr. F.'s conclusion leaves room for doubt since he is able to say only that "the most probable cause" of symptoms was the car accident, and that is "far more likely" to be the cause than the work injury. This is hardly conclusive, and in view of the numerous dissenting opinions from other specialists, the benefit of any doubt should be in [the complainant]'s favour.

I hope that this decision will be reversed and the claim for compensation recognized on this basis.

The submission of the accident employer dated August 26, 1983, stated the following:

In summation, it is the position of the company that the Workers' Compensation Board has thoroughly reviewed all aspects of the case and has followed the proper procedure in seeking the opinion of a Medical Referee. This procedure should not be completely overturned but the necessary clarification should be obtained.

The Temporary Ombudsman reviewed this case in light of our investigation and the representations of the Board and the accident employer.

It appeared to the Temporary Ombudsman that the Board's response of May 16, 1983 to the Ombudsman's recommendation pursuant to section 19(3) of the Ombudsman Act and its subsequent action which resulted in the Appeal Board

decision of November 2, 1983 did not effectively deal with the possible conclusion and recommendation as set out in the Ombudsman's letter of April 21, 1983, nor did it resolve the question of clarity insofar as the Medical Referee's report was concerned.

In its response, the Board indicated that while the Medical Referee's report might not have been conclusive for the Ombudsman, the Appeal Board could not agree that for its own purposes, the report was not conclusive. In the Temporary Ombudsman's view, clarity in the Medical Referee's report is necessary for both his purposes and those of the Workers' Compensation Board. Certainly, the Board must agree that both this Office and itself share the same purpose: that of just compensation for injured workers. The Temporary Ombudsman was therefore of the opinion that because the Medical Referee's report had such significance in this case, especially when considered in conjunction with the other clearly supportive reports, that the Referee's report was not sufficiently clear to have been deemed conclusive by the Board.

Taking an overall review of the complainant's history with the Board and this Office, a sequence of events which has now unfortunately gone on for several years, it appeared to the Temporary Ombudsman that the guiding factor applied in all this Office's investigations - that of judging the validity of the complaint on the basis of all evidence - must apply in this complaint.

Therefore, it was the Temporary Ombudsman's opinion that the possible conclusion and possible recommendation as outlined in the Ombudsman's letter of April 21, 1983 were still valid as, in his view, the Board's actions and reasons did not presented him with a significant refutation of the arguments already outlined.

It therefore appeared open to the Temporary Ombudsman to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that it was unreasonable for the Appeal Board not to have directed otherwise than that the Medical Referee's report was conclusive and thereby to have denied the complainant entitlement to benefits on this basis alone, notwithstanding the other evidence before it.

The Temporary Ombudsman was also of the opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Board's continued refusal to deny the complainant's claim had been unjust given the preponderance of evidence which supported the relationship.

The Temporary Ombudsman recommended, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant the complainant entitlement to compensation benefits on the basis of all the evidence before it.

This recommendation was included in a report to the Chairman dated February 10, 1984.

The Board had not responded to the report and recommendation by March 30, 1984. The Ombudsman therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 17

The complainant wrote to this Office on March 14, 1982, with a complaint against a decision of the Appeal Board of the Workers' Compensation Board dated February 9, 1982. The complainant contended that the Appeal Board was unreasonable to deny further entitlement for a left wrist disability as being causally related to her industrial accident of April 14, 1967. The complainant further contended that the carpal tunnel syndrome of her left wrist, diagnosed on July 11, 1969, resulted directly from her accident of 1967 and, consequently, so too did the subsequent complications in 1978. The Appeal Board concluded that, "a relationship between the complainant's further disability, diagnosed as left wrist carpal tunnel syndrome and exostosis of second and third metacarpals of the left hand are not causally related to the industrial accident of April 14, 1967, nor are they causally related to the work as performed by the complainant."

On April 27, 1982, the Chairman of the Workers' Compensation Board, was notified in accordance with the requirements of the Ombudsman Act of our intention to investigate the complaint. He was invited to make a statement of the Board's position on the complainant's claim.

On May 6, 1982, the Vice-Chairman of Appeals responded on the Chairman's behalf by stating that the Board did not wish to make a statement at that time.

This complaint was assigned to a member of our investigative staff, who thoroughly reviewed the complainant's Workers' Compensation Board claim file, discussed the complaint with the complainant, and considered the relevant legislation and Board policy and practice in relation to the issue.

Our investigation revealed that on April 14, 1967, the complainant tripped while going up a flight of stairs and her left hand caught on the edge of the step, forcing her hand to go backwards, and causing a painful left wrist. The accident happened while the complainant was at work, and she reported it to her employer. Her wrist was bandaged by the first aid attendant; there was no lost time or further medical attention. After the initial swelling went down, the complainant noted a lump on her wrist, later diagnosed as a ganglion. The complainant continued to work, with occasional complaints of pain to a co-worker.

On July 4, 1969, the complainant was examined by her family physician, Dr. A., with complaints of pain in the left wrist, radiating down to the fingers. An orthopaedic specialist, Dr. B., diagnosed carpal tunnel syndrome of the left wrist, and surgery for a decompression was carried out on August 11, 1969. At the same time, a ganglion was noted. After a three-week period of recuperation, the complainant returned to her job.

On June 29, 1978, the complainant had the ganglion removed from her left wrist. The Board accepted the surgery as being medically related to the complainant's accident of April 14, 1967. Compensation benefits were paid from June 29, 1978 to July 20, 1978. The complainant continued to experience pain after the removal of the ganglion. Her condition was diagnosed as carpal tunnel syndrome and exostosis. The complainant has not returned to work since June, 1979, and only worked for short periods of time between July 1978 and June 1979.

Prior to rendering a final decision, the Board referred the complainant to Dr. C., a noted specialist, who, in turn, referred her to Dr. D..

In its decision of February 9, 1982, the Appeal Board concluded that the complainant's disability, diagnosed as left wrist carpal tunnel syndrome and exostosis of second and third metacarpals of the left hand, was not causally related to the industrial accident of April 14, 1967, nor was it causally related to the work performed by the complainant.

During the course of our investigation into this complaint, it became apparent to this Office that to properly consider this complaint, it was necessary to separately evaluate and consider the following two questions:

1. Was [the complainant]'s surgery of August 11, 1969 for decompression of carpal tunnel syndrome related to her falling accident of April 14, 1967?
2. Was her ongoing disability diagnosed as carpal tunnel syndrome and exostosis resulting in lost time from work subsequent to July 20, 1978 related to the fall of April 14, 1967 and subsequent 1969 surgery?

In the early phase of the investigation, this Office had corresponded with the Board and requested an expansion and clarification of the Appeal Board's reasons why the supportive opinions of two specialists, Dr. D. and Dr. B., as well as the opinion of the complainant's family physician, Dr. A., had not been accepted as evidence by which the claim could have been allowed, and why the policy of benefit of doubt was not applied.

The Assistant Secretary of the Board, responded in a letter dated December 2, 1982, stating the following:

The panel did not accept the medical opinions of Dr. B. and Dr. A., since both reports contained factual inaccuracies. Should your investigation contradict the finding of factual inaccuracies, I would be pleased to refer the matter back to the panel for its further consideration.

The panel did not accept Dr. D.'s opinion for the reasons set forth in Dr. E.'s memorandum of March 31, 1981.

The policy of benefit of doubt was not applied since, in the panel's opinion, the weight of evidence for and against was not approximately equal in weight.

Correspondence was entered into by this Office with Dr. B. and Dr. A.. Both doctors were asked to review their opinions regarding the complainant's case, keeping in mind the correct set of facts. In their earlier reports, both physicians had referred to dates of treatment incorrectly, i.e., June 1969 instead of August 1969. The responses of these physicians, who continued to support the complaint, were submitted to the Board.

The Board's response to these submissions was received in a letter dated April 18, 1983, which stated the following, in part:

The panel notes that Dr. B.'s report of January 26, 1983 is in error, in that he suggests that [the complainant]'s surgery in August of 1969 was compensable. This surgery, for a carpal tunnel syndrome, was not compensable.

The panel also notes that Dr. A.'s argument goes to the question of the relationship between the ganglion and the compensable events. As you know, the Board has accepted that [the complainant] has entitlement for the ganglion and its removal. Dr. A. appears to be of the view that [the complainant]'s continuing problems are due to the surgery in August of 1969, by Dr. B.. Dr. B., on the other had, feels that the continuing problems are due to the surgery by Dr. A. in June of 1978.

Neither doctor appears to be acquainted with the fact situation as accepted by the Appeal Board, and as recorded in memo 3. In fact, Dr. A. concedes that "it is quite possible that [the complainant]'s testimony to me hasn't been accurate".

Under the circumstances, the Appeal Board did not feel that the recent information from Drs. B. and A. would give it cause to change its views of this case.

Having deliberated on the two questions under investigation, and after reviewing all information on file and correspondence received from the Board, the Temporary Ombudsman reached two possible conclusions, pursuant to section 22(1)(b) of the Ombudsman Act. In the first possible conclusion, he indicated that "the Appeal Board was unreasonable to conclude that the complainant's surgery for carpal tunnel decompression carried out on August 11, 1969 was not related to her compensable injury of April 14, 1967."

In his second possible conclusion, the Temporary Ombudsman concluded that "the Appeal Board was unreasonable to conclude that the continuing problems subsequent to July, 1978, diagnosed as left wrist carpal tunnel syndrome were not causally related to the industrial accident of April 14, 1967."

The Chairman of the Board and the accident employer were advised of the possible conclusions and recommendations in a letter dated November 15, 1983.

In support of the first possible conclusion, the Temporary Ombudsman cited the following evidence:

1. The opinion of Dr. D., Specialist in Physical and Rehabilitative Medicine, as outlined in his report of October 20, 1980:

I think the problems of the back of her wrist and the problems of the front of her wrist are clearly compensable, related to the same accident incident.

2. The report of Dr. B. dated September 29, 1981:

In my opinion a fall resulting in a sudden hyperextension injury to the wrist in 1967 could have caused a carpal tunnel type of syndrome which was relieved by surgery in 1969. I think that she should have some compensation because of her injury in 1967, until at least three weeks after the surgery was done in June 1969 [sic]. [This should read August 1969.]

3. The report of Dr. B. dated January 26, 1983:

In my opinion this disability, regarding the initial injury in 1967, resulted in an eventual carpal syndrome which was treated successfully in August 1969. This was a compensation injury, in my opinion, for a few weeks after the time of surgery and she sufficiently recovered to return to work.

4. Dr. A., [the complainant]'s family physician, indicated the following in his report dated February 28, 1983:

It seems to me that the patient did suffer from an injury to the wrist, a wrist which became subsequently the site of a ganglion, which was surgically excised, and also of a nerve entrapment syndrome, which was apparently treated surgically by Dr. B. in August of 1969, ...

In conclusion, [the complainant] suffered from an injury to the wrist, which produced a carpal tunnel syndrome.

The Temporary Ombudsman tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act, "that the Appeal Board revoke its decision of February 9, 1982 and award the complainant entitlement for the 1969 surgery to correct the carpal tunnel syndrome as being related to and caused by her compensable accident of 1967."

With reference to the second possible conclusion, the Temporary Ombudsman indicated:

... my investigation has placed particular emphasis on the opinion of Dr. D. As a specialist in this field of medicine, Dr. D. rendered his opinion, as quoted earlier in this report, having had the benefit of examining [the complainant] and conducting appropriate testing.

The Temporary Ombudsman went on to state:

Further, I have noted the opinion of Dr. A., [the complainant]'s family physician, as outlined in his report of November 23, 1981:

... her current complaints, which I believe to be due to a compression of the ulnar nerve at the wrist and it is precisely this occurrence, that in my view, cannot possibly be separated from her accident of April 1967. I believe she should be given the benefit of the doubt.

In a further report, dated February 28, 1983, Dr. A. reiterated:

In regards to the nerve entrapment syndrome, following surgery for carpal tunnel syndrome, which was the consequence of her working accident, I stand by my previously expressed opinion, that this is the result of her surgery to the wrist for release of carpal tunnel.

During the course of the investigation, we also took note of the dissenting opinions rendered by Dr. E. and Dr. F. of the Board. It was also noted

that these doctors never examined the complainant. The fact that Dr. B. was of the opinion that the complainant's problems subsequent to 1978 were related to the surgery which was done on June 29, 1978 by Dr. A. was also considered.

Dr. E. stated the following in a memo dated November 5, 1980, after review of Dr. D.'s report:

I am not in agreement with Dr. D.'s opinion as to the relation of the carpal tunnel syndrome and the compensable incident.

We do not have Dr. C.'s opinion which is what we really want....

Dr. C., to whom the complainant had been sent by the Board, did not directly address himself to the question of a relationship, suggesting instead that the Board do this.

In a further memo dated March 31, 1981, Dr. E. stated:

I have reviewed this file again. This lady had an injury when she fell going up stairs on the 14th of April 1967. We have a diagnosis of carpal tunnel syndrome some 2 years and 3 months later with a one month history. There was also thought to be what might well have been a ganglion at that time and she was subjected to an operation.

Neither the carpal tunnel syndrome nor the ganglion were in any way related to the fall. It is my view that they would have surfaced long before two years and two months after the incident. The possibility of the ganglion having been there for some time must be considered and indeed in the patient's history as given to Dr. G. the lump appeared rather indefinitely and presumably antedated [sic] the development of the carpal tunnel syndrome. It is for this reason that we considered this a benefit of doubt type of situation which we could not resolve and recommended acceptance of it. Having accepted the ganglion we now find that it disappeared at about the time of the surgery and this is quite in keeping with what happens because of course tourniquets are put on and the application of a tourniquet to a region containing a ganglion can be sufficiently forceful to squash it and have it disappear only probably to reappear again and this would appear to me what has been done and there was a subsequent removal of this ganglion. This would presumably be accepted if we had already accepted the fact of the ganglion. It would have no bearing on the acceptance or rejection of the carpal tunnel problem.

Now she has a continuing carpal tunnel problem and presumably there has been some fibrosis in the region of previous surgery. This would not appear to be any more of a compensable problem now than it was previously. She also has a small insignificant exostosis and this is not a ganglion and has no relevance and is not part of the compensable disorder. I would suggest therefore that the third of your alternatives is the most acceptable professionally.

Dr. E. was responding to a request for his opinion from an Appeals Adjudicator, to whom the matter had been referred upon appeal by the complainant. Dr. E.'s last sentence refers to the Adjudicator's suggested three ways of dealing with the issue of entitlement. These were:

1. Accept the original carpal [sic] tunnel syndrome and surgery in 1969 as being related to the accident, noting the confirmation of continuing complaints for 2 years by a co-worker, and continuing entitlement.
2. Confirm the denial of entitlement for the original carpal [sic] tunnel syndrome and allow the current problems if these can reasonably be related to the surgery for ganglion for which entitlement was granted in 1978, noting the continuing complaints since that surgery was performed.
3. Deny entitlement completely for the carpal [sic] tunnel syndrome & allow only for the ganglion, if such can be justified.

Dr. F. reviewed the claim upon request of the Appeal Board and stated the following, in part, in a memo dated December 8, 1981:

The central issue in this situation still seems to remain the question of whether or not the carpal tunnel decompression effected in August of 1969 by Dr. B. should have been considered a compensable matter in relation to the incident of the 10th of April 1967. When one reviews the investigation notes, there is continuity from one co-worker but no continuity otherwise. The period of time is one of 2 years and 3 months and like my predecessor I find it difficult to believe that a presumption of relationship is justified.

The accident employer did not respond to the Temporary Ombudsman's tentative conclusions and recommendations. However, the Chairman of the Board responded on November 28, 1983, and stated the following in his letter:

As you know, correspondence was exchanged between your Office and the Board, concerning the reasons why the Board did not accept the medical opinions on which you have based your tentative conclusions. In the panel's view, the Board's letters of December 2, 1982 and April 18, 1983 adequately explain its position in respect of this evidence. The Appeal Board points out, that the reasons given for not accepting this evidence went beyond the issue of the delay in the onset of symptoms, on which you comment on page 4 of your report.

With specific regard for your second tentative conclusion, the Appeal Board agrees there are more medical opinions supporting a relationship than opinions against. However, the Appeal Board prefers to weigh the evidence before it on the basis of quality, rather than quantity and thus considered the evidence of Drs. E. and F. to have greater weight than the collective evidence of Drs. B., A. and D..

Under the circumstances, the Appeal Board does not intend to implement your tentative recommendation.

The Chairman's response to the tentative conclusions and recommendations was considered and renewed attention was given to the Board's concerns about the factual inaccuracies in the medical reports as outlined in its letters of December 2, 1982 and April 18, 1983.

As a general comment, we were satisfied that Doctors B. and A. were clearly aware of the fact situation and had an understanding of the issues at hand when rendering their respective opinions. These physicians reiterated their opinions keeping the accuracy of the facts in mind as indicated earlier in this report and, for this reason, the Temporary Ombudsman was not persuaded by the Board's position in this respect.

With reference to the Board accepting the opinion of Dr. E. over that of Dr. D., it was the Temporary Ombudsman's view that this was unreasonable for two reasons. Firstly, Dr. E. is not a specialist in this field of medicine and secondly, he rendered his opinion without the benefit of either treating or examining the complainant. On the other hand, Dr. D. is a specialist in this area of medicine and rendered his opinion after examination of the complainant on more than one occasion and after carrying out extensive testing of her condition before documenting his comments. It is also of significance that when the Board sought an outside opinion from Dr. C., he, presumably recognizing Dr. D.'s greater expertise in this field of medicine, decided to refer the complainant to Dr. D..

The Board's statement as outlined in the letter of December 2, 1982 that the weight of evidence for and against was not approximately equal, is correct. Indeed, it would appear that the greater weight of the evidence supports the complainant's claim.

Giving attention to the Board's letter of April 18, 1983, it would appear that although Dr. B. in his report of January 26, 1983 was not clear on the issue of whether or not the complainant actually received compensation benefits in 1969, what is important is the fact that he states clearly in the last paragraph of that report that the carpal tunnel surgery in 1969 resulted from the 1967 injury and was, therefore, compensable.

In its letter of April 18, 1983, the Board notes that Dr. A. and Dr. B. disagree on the cause of the complainant's problems subsequent to 1978. Dr. A. attributes the problems to the surgery of 1969, while Dr. B. feels that the continuing problems are due to the surgery in June of 1978.

The Temporary Ombudsman stated that, while he was aware of this difference of opinions, it appeared to him that both these arguments led to the same conclusion - that the complainant's claim was compensable - albeit from different points of view. This difference in medical opinions cannot, he noted, be used to discredit the complainant's claim for compensation.

As a final comment, the Chairman's statement wherein he indicated the following was noted:

The Appeal Board agrees there are more medical opinions supporting a relationship than opinions against. However, the appeal Board prefers to weigh the evidence before it on the basis of quality, rather than quantity and thus considered the evidence of Drs. E. and F. to have greater weight than the collective evidence of Drs. B., A. and D.

With great respect for the opinions of the Board's doctors, the Temporary Ombudsman stated that he could not agree with the Appeal Board's decision to favour the evidence of the Board's doctors in this case over that of the independent treating physicians. All the independent physicians quoted, Dr. B., Dr. A. and Dr. D., have first-hand knowledge of the complainant's case as

they have treated her. Dr. D. is a specialist, as is Dr. B. Dr. A. has been the complainant's family physician for a number of years. Dr. E. and Dr. F. do not have specializations in this field of medicine nor have they ever examined the complainant. Given this set of facts, the Temporary Ombudsman indicated that he was bound to conclude that both the quantity as well as the quality of the evidence from the independent physicians is superior and therefore, the Appeal Board, in his opinion, should have accepted this information and granted entitlement to the complainant.

Accordingly, it was his opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board, in its decision of February 9, 1982, was unreasonable to deny the complainant entitlement for the 1969 surgery to correct a carpal tunnel syndrome as being related to and caused by her compensable accident of 1967. The Board was further unreasonable to deny the complainant entitlement for her disability subsequent to 1978 diagnosed as carpal tunnel syndrome as being related to her compensable accident of April 14, 1967.

He therefore recommended, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision of February 9, 1982 and acknowledge entitlement for the above disabilities as being related to the complainant's compensable injury of April 14, 1967.

This recommendation was included in a report to the Chairman dated February 15, 1984.

The Board had not responded to the report and recommendation by March 30, 1984. The Ombudsman therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 18

The complainant registered his complaint against the Workers' Compensation Board with this Office on June 17, 1981. The complainant contended that the Appeal Board, in its decision dated June 4, 1981, was unreasonable in denying him entitlement to temporary total disability benefits from May 5, 1980 to June 5, 1980, and further, that the Appeal Board was unreasonable in calculating his temporary benefits on the basis of earnings prior to his original accident in 1969.

On July 8, 1981, the Chairman of the Workers' Compensation Board, was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. He was also asked whether he wished to make a statement of the Board's position in relation to the complaint. On behalf of the Chairman, a reply was received from the Vice-Chairman of Appeals, advising that since the complaint filed with the Ombudsman and the issue decided upon by the Appeal Board appeared to be the same, the Board did not wish to make a statement at that time.

Our file on this complaint was then assigned to two members of our investigative staff. During the investigation, our investigators conducted a thorough review of the complainant's Workers' Compensation Board claim file. In addition, they obtained further information from the complainant, and contacted prospective employers named by the complainant to the Appeal Board, as well as the medical clinic which the complainant attended during the time in question. The relevant legislation, policy and practices of the Workers' Compensation Board in relation to this issue were also carefully considered.

As a result of the investigation of this complaint, the Temporary Ombudsman concluded that he was unable to support the complainant's claim that he should have received entitlement for benefits between May 2, 1981 and June 4, 1981. The complainant, as well as the Workers' Compensation Board, was advised of this under separate cover. This report therefore concerns the complainant's contention that his temporary benefits, which commenced June 5, 1981, should have been calculated on the basis of his earnings in the months prior to the recurrence, rather than on the basis of earnings prior to his accident in 1969.

The investigation carried out by our Office indicates that on November 5, 1969, the complainant, then a ranger/labourer, fell 50 feet, fracturing his right heel and incurring compression fractures of the lumbar spine. Initial treatment was conservative and included rest and rehabilitation. The complainant eventually returned to work in 1971 as a stockman for a railway company. However, due to deterioration in his right foot condition, he was forced to leave work and undergo surgery in December 1972. Upon recovery, he again returned to work as a truck driver until 1975, when increasing discomfort in the right foot necessitated additional surgery consisting of a refusion of the calcaneocuboid joint. The complainant again returned to work once he recovered from the effects of the surgery. Unfortunately, his back disability increasingly troubled him, until in 1977 he was forced to undergo back surgery consisting of disc excision and spinal fusion. As anticipated by the surgeon who performed this operation, the complainant took quite a long time to recover. The complainant was assessed several times by the Pensions Branch and by 1979 he was in receipt of a 28% permanent disability award.

In January 1980, the complainant commenced work as a welder; however, during the spring of that year, he reports that he experienced increasing back discomfort. The complainant was notified by his employer that he, along with several other co-workers, would be laid off on May 5, 1980 due to lack of work. On May 2, 1980, the complainant states that his back pain became so severe that he was unable to finish his shift. He therefore decided to lay off early due to back pain and was unable to return to work again prior to the pre-arranged layoff. According to the complainant's evidence, he initially attempted to treat his back condition with rest and analgesics. As his back did not improve after several weeks, the complainant went to see his doctor on June 5, 1980.

From June 5, 1980 onward, the complainant continued to see his family physician frequently and in addition was examined and treated by Dr. A., an orthopaedic surgeon. This course of treatment continued into 1981 and the Board was notified that the complainant was suffering from chronic back pain.

The Workers' Compensation Board accepted the complainant's condition as a recurrence of his original back disability. The Board further deemed the recurrence to have commenced as of the first visit to the doctor on June 5, 1980. Payment of temporary total disability benefits to the complainant therefore

commenced as of June 5, 1980. In order to arrive at the complainant's rate of temporary benefits, the Board applied section 40 of the Workers' Compensation Act, which reads as follows:

Where an employee, who has become entitled to benefits under this Act and has returned to employment, becomes entitled to payment for temporary disability by reason of any matter arising out of the original accident, the compensation payable for such temporary disability shall be paid on either the average weekly earnings at the date of the accident or the average weekly earnings at the date of recurrence of the disability, calculated in the manner set out in section 39, whichever is the greater.

On October 3, 1980, the Claims Review Branch decided that the complainant's benefits would be calculated on the basis of his income prior to his 1969 accident, as he could not show that he had any earnings during the four weeks prior to June 5, 1980.

On June 4, 1981, the Appeal Board concluded that it was "unable to deviate from the Board's policies and procedures regarding the calculation of compensation as outlined in Section 40 of the Workmen's Compensation Act."

As a result, the complainant received benefits of \$99.60 per week, which amount included the escalation provided for in section 42 of the Workers' Compensation Act. It should be noted that during April 1980, the complainant was earning approximately \$398. per week on average. Had the complainant's earnings during the period prior to May 2, 1980 been used as an earnings basis in calculation of his benefits, his temporary benefits would have been considerably higher.

It was noted that section 40 of the Act requires that compensation be calculated on the basis of "average weekly earnings" at the date of the recurrence or the accident. Further, section 45 of the Act requires that "average weekly earnings" be calculated in a manner which will best reflect the true rate of remuneration:

45(1) Average earnings shall be computed in such a manner as is best calculated to give the rate per week or month at which the employee was remunerated but not so as in any case to exceed the rate of \$25,500 per annum.

The Board has approved policy directives pursuant to section 45 which read in part as follows:

Directive 2 (1) The present general practice of computing the average weekly earnings during the four weeks prior to the date of accident is to be continued in determining the earnings basis for temporary disability payments as this method has proven to be the manner best calculated to give the rate per week or month at which the employee has [sic] remunerated as per Section 44(1), subject to the other subsections in Section 44.

(3) On the request of the employee or the employer that it would be more realistic to use the earnings for the twelve months prior to the accident for the temporary disability basis, discretion will be used and where is [sic] is proper, such earnings will be taken to adjust the basis for temporary disability.

Usually, upon recurrence of a disability, the Board establishes the earnings base of the injured worker on the basis of income during the four weeks immediately prior to the recurrence. This practice is based on the policy formulated pursuant to section 45. It is also evidenced in the Claims Adjudication Branch Procedures Manual in the section concerning computing, which states that in order to determine the earnings basis, an Adjudicator must find out the gross earnings during the four weeks prior to the date of the recurrence. Generally, the policy of calculating benefits on the basis of earnings in the four weeks immediately prior to the recurrence works in favour of the claimant as the most recent earnings are the highest. However, in the case of the complainant, the strict application of this part of the policy resulted in what appears to be an inequity.

The Ombudsman noted also that the Board has the discretion under its policies approved under section 45 to calculate average weekly earnings in the case of an accident on the basis of income during the twelve months prior to the layoff. While this policy refers to earnings prior to an accident, in our view it would be an inconsistent application of the Act to arrive at average earnings prior to a recurrence on a different basis from that used for average earnings prior to an accident.

During the course of our investigation, the Temporary Ombudsman formed the tentative view that:

... pursuant to section 22(1)(b) of the Ombudsman Act that the Appeal Board's decision to use average weekly earnings as of the date of the accident as an earnings basis was unreasonable.

In a letter dated August 30, 1983, written pursuant to section 19(3) of the Ombudsman Act, the Temporary Ombudsman advised the Chairman and the accident employer, the Ministry of Natural Resources, of the possible conclusion and the consequent possible recommendation. In support of the possible conclusion and recommendation, he pointed out that:

In support of this conclusion, I wish to point out that according to section 40 the intent of the legislation is to compensate in accordance with the greater earnings basis. [The complainant] had been working during five of the six months prior to the recurrence of his disability. Average weekly earnings could easily have been arrived at through calculations on the basis of a period greater than the four weeks immediately prior to the recurrence of the disability. In view of section 45 which requires that average weekly earnings be calculated in a manner to accurately reflect earnings, the restriction of such a calculation to four weeks is not required by the statute and in this case works an inequitable result. The refusal to calculate an earnings basis on 1980 income has resulted in [the complainant] receiving benefits based on 11 year old earnings with extremely low benefits. This manner of arriving at the quantum of [the complainant]'s benefits appears therefore to conflict with the intent of the Act as reflected by section 40.

The letter of August 30, 1983, went on to state that:

It would appear that it might be open to me to recommend, pursuant to section 22(3)(c) of the Ombudsman Act that the Appeal Board vary its decision and calculate the temporary total benefits on the basis of [the complainant]'s earnings during a period greater than four weeks which would fairly represent his earnings prior to the recurrence of the disability.

The Chairman responded to this letter on October 20, 1983. In this letter, he stated that he was not in agreement with the tentative conclusion and tentative recommendation. In justification of the Board's position, he pointed out that policy directives pursuant to section 40 of the Workers' Compensation Act provide as follows:

"If there are no earnings at the time of the most recent recurrence, payment shall be based on the earnings at the time of the original accident adjusted in accordance with the provisions of (then) Section 41 (a) (1) and Section 44 (1)."

The Chairman indicated that while the Board recognized that relying on pre-accident earnings to calculate post-recurrence benefits might result in inequity, sections 42 and 45 provided some relief against unfairness. According to the Chairman, in the case of the complainant, the application of the relieving sections resulted in an increase from benefits which would have been at a rate of \$67.23 per week to benefits at a rate of \$99.00 per week. Finally, according to the Chairman's letter, it is the position of the Board that the wording of section 40 will not allow the calculation of benefits on the basis of earnings prior to the recurrence if the injured worker had no income at the date of the recurrence.

In considering the Chairman's response, the Ombudsman noted that the policy which he cites would appear to contradict the Claims Adjudication Procedures Manual pertaining to section 40, which is as follows:

1. To consider the application of Section 40 the Claims Adjudicator obtains the following earnings information:
 - the gross earnings for four weeks prior to the date of accident AND prior to the date of layoff or
 - where the period prior to the date of layoff is less than four weeks, the gross earnings from the date of the most recent employment up to but not including the date of layoff.

In addition, he noted that the Claims Review Branch, in arriving at a decision with respect to this matter, stated that in the event of a recurrence: "... a new (earnings) basis may be established using the earnings in the four weeks prior to the date of the layoff or medical attention. In your case, in the four weeks prior to June 5, 1980, there were no earnings due to your lost time from work due to lack of work."

It is clear, therefore, that the Claims Review Branch, in arriving at a decision, addressed its mind to the question of earnings during the entire four week period prior to the recurrence and not simply to whether or not there were

actual earnings at the date of the recurrence. Unfortunately, the Appeal Board decision is particularly unhelpful with respect to this issue as it only confirms the prior decisions as having been made properly.

In the Ombudsman's view, this contradiction between the Board's practice and its policy arises out of a rigid interpretation of section 40 which is not in keeping with the intent of the legislation, particularly as this is evidenced by section 45. Section 40 requires not that there be actual earnings at the date of the recurrence, but rather that there be "average earnings". In the Ombudsman's view, it is incorrect to interpret "average earnings" to mean only earnings at the date of the recurrence. The term "average earnings" in common usage denotes earnings over a period of time. Section 40 therefore requires the Board to look at the earnings of the injured worker during a period prior to the recurrence.

By section 45 of the Act, the Legislature explicitly articulated a standard which echoes the implicit intent of the legislation. This section states that "average earnings" must be calculated in the manner which will best reflect the earnings of the injured worker.

In practice, the Board looks at earnings in the four weeks immediately prior to the recurrence. This would appear to be quite fair in most cases, as the latest earnings are usually the highest. However, in certain cases such as that of the complainant, it is in fact an arbitrary formula and can work an injustice. Where a worker had stable earnings until one month prior to the recurrence, it is in our view unreasonable to restrict the calculation of average weekly earnings to a four-week period without any consideration to the particular circumstances of the case. Such an application of section 40 would also appear to be contrary to the expressed intent of the Legislature with respect to "average earnings", as articulated by section 45. Furthermore, it would appear that by restricting the calculation of "average weekly earnings" to a period of four weeks only, the Board is fettering its discretion under sections 40 and 45 of the Workers' Compensation Act.

Finally, the Ombudsman noted that the Chairman has stated that sections 42 and 45 of the Workers' Compensation Act are meant to be relieving provisions in a case such as the complainant's. He was not persuaded by this argument, as the increase provided by these adjustments is considerably lower than benefits the complainant would have received had his income prior to the recurrence been taken into consideration in calculating his earnings basis.

A response was received from the then Deputy Minister, on behalf of the employer, on September 23, 1983. It stated that the Ministry was in agreement with the Appeal Board decision and wished to be afforded additional time to review this file prior to making submissions. It also pointed out that the possible recommendation would affect all employers in the province. Final Ministry submissions in this matter were received from the Deputy Minister on February 21, 1984. He stated that the Ministry is in agreement with the original criteria used by the Board in calculating the complainant's benefits. He also noted that the Ministry had found no reason to change the opinion earlier expressed by his predecessor.

The Ombudsman recognized that should our recommendation be implemented, there might be an impact on both employees and employers in similar situations. However, as it was the Ombudsman's opinion that the proposed approach would result

in a fairer application of the statute which is more in keeping with its intent, he was not persuaded that the possible impact on other similar claims should deter him from making this recommendation.

It was therefore the Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board, in its decision of June 4, 1981, wherein the Appeal Board approved the calculation of the complainant's temporary benefits on the basis of earnings prior to his original accident, was unreasonable. This decision appears unreasonable as it is based on an interpretation of section 40 of the Workers' Compensation Act which is too restrictive and does not give adequate weight to the words "average earnings".

It was therefore the Ombudsman's recommendation, pursuant to section 22(3)(c) of the Ombudsman Act, that the Appeal Board vary its decision and calculate the temporary total benefits on the basis of the complainant's earnings during a period greater than four weeks which would fairly represent his earnings prior to the recurrence of the disability.

The Board was notified of the Ombudsman's opinion and recommendation in a report dated March 2, 1984. By March 30, 1984, the Board had not responded, and therefore the Ombudsman referred the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 19

The complaint against the Workers' Compensation Board was first brought to the attention of this Office in a personal interview with a member of our investigative staff on February 19, 1979. At that time, the complainant advised that he was dissatisfied with an Appeal Board decision dated August 4, 1978, which denied him entitlement to an award for psychological disability attributable to an industrial accident on July 18, 1974.

By letter dated March 13, 1979, the then Chairman of the Workers' Compensation Board, was notified, pursuant to the requirements of section 19(1) of the Ombudsman Act, of our intention to investigate the complaint. He was also asked if he wished to provide a statement respecting the Board's position.

The Vice-Chairman of Appeals responded on the Chairman's behalf, indicating that the issue to be investigated had been dealt with by the Appeal Board, and the Board therefore declined to make a statement at that time.

The investigation carried out by this Office consisted of a thorough review of the Workers' Compensation Board claim file documentation, discussions with the complainant, and a review of the relevant legislation and Board policies.

The investigation revealed that the complainant has been involved in three compensable accidents. The first took place on October 10, 1972, the second, on April 30, 1973, and the third, on July 18, 1974; however, his claim to an award for psychological disability arises only from the third accident.

On July 18, 1974, while in the course of his employment as a cement mason, the complainant attempted to move a trowel machine, when he felt a sudden

sharp pain in his back. An initial diagnosis of acute strain of the lumbar spine was made by the complainant's family physician, at whose office he attended on July 22, 1974.

The first indication of any psychological disability in connection with the injury sustained in this accident is contained in the report of Dr. A., a neurosurgeon, who examined the complainant at his family physician's request in July, 1974. Following his examination, Dr. A. expressed the view that the complainant had a lumbar disc protrusion, but also felt there was "an overlying anxiety state".

In late 1974, the complainant was sent by his family physician to Dr. B., a physiatrist, who recommended acupuncture treatment to alleviate the complainant's back and neck pain, and also felt that "some psychological assistance" was indicated.

In March, 1975, Dr. B. referred the complainant to Dr. C., a psychiatrist. Following his consultation with the complainant on May 1, 1975, Dr. C. made these comments:

Under sodium amytal there was a mild reduction in the pain, but it persisted relatively unchanged even at the deepest levels. My impression was that the complainant suffers largely from organic pain, with a mild functional overlay. His pain and disability have resulted in a chronic state of mild to moderate depression. I would think that the depression is not severely disabling, but that it relates quite directly to his injury. The complainant might benefit from a trial of anti-depressant medication, but I doubt if this will be effective in the long run unless something more definitive can be done for his pain.

In late November, 1975, following an unsuccessful attempt at returning to work, the complainant was admitted to the Workers' Compensation Board's Hospital and Rehabilitation Centre. While there, the complainant was examined by an orthopaedic consultant, Dr. D., who concluded that the complainant had a mechanical source of pain in his lower back. He was also examined by a psychiatric consultant, Dr. E., who made these comments:

This patient gave the impression of a sincere person who appears genuinely depressed. It is very difficult to ascertain whether the depression has been caused by his back trouble and if and to what extent his emotional condition has contributed to the development and maintenance of his painful condition. However, there seems to be a connection.

On August 19, 1976, the complainant was examined by a Board Medical Officer at the Pensions Branch for the purpose of assessing him for a permanent partial disability award for the injury sustained in the July, 1974 accident. As a result of the examination, the original 10% permanent disability award for back and neck disabilities which he had been granted for injuries arising out of the 1973 accident was confirmed, and he was given a further 5% award for the exacerbation of his back disability arising out of the July, 1974 accident. No mention was made of any psychological disability at that time.

A pension review was conducted on May 11, 1977, at which time the awards for organic disability were confirmed, and once again, no mention was made of a psychological disability.

Dr. F., a psychiatrist, examined the complainant on January 25, 1978, at the request of his new family physician. Dr. F. diagnosed hysteria, and he recommended that the complainant be encouraged to return to work at the earliest possible time.

The matter came before the Appeal Board on April 17, 1978. Prior to rendering a decision, the Appeal Board referred the question of psychological entitlement to Dr. G., the Board's psychiatric consultant, for his opinion.

In a report dated April 27, 1978, Dr. G. commented that psychological entitlement did not appear to be justified on the basis of the available information, but requested a psycho-social evaluation before reaching any final conclusions.

In a brief note dated June 7, 1978, Dr. G. commented that there was no merit for a psychological entitlement.

The Appeal Board accepted and relied upon Dr. G.'s opinion, and in its decision dated August 4, 1978, stated that the complainant's psychological disability could not be attributed to his compensable accidents.

During the course of the investigation, the Ombudsman formed the view that it might be open to him to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that:

the Appeal Board was unreasonable to conclude that the complainant's psychological disability could not be attributed to the accident of July 18, 1974;

the Appeal Board unreasonably delegated its decision-making power with respect to the question of entitlement, to the Psychiatric Consultant.

In a letter dated June 9, 1982, the Ombudsman advised the Chairman of the Workers' Compensation Board of these tentative conclusions and tentative recommendations. In support thereof he indicated that:

The report rendered by the complainant's treating psychiatrist, Dr. C., relating to his examination on May 1, 1975, indicates that in his view the complainant did suffer from a psychological disability which was directly related to the accident. In his view, the complainant suffered from a form of depression that was not severely disabling, but was directly related to the accident of July 18, 1974. This view was supported by the reports of Drs. A., B., and F., and by one of the Board's Psychiatric Consultants, Dr. E. The only evidence to the contrary seems to be the opinion of Dr. F., another of the Board's Psychiatric Consultants. This opinion was rendered following the Appeal Board's referral to Dr. G. in April 1978, requesting that he evaluate the complainant's entitlement to a psychological award.

With respect to Dr. G.'s opinion, it seems implicit in his memo dated April 27, 1978, wherein he requested a psycho-social evaluation of the complainant's family, that he recognized that the complainant did have a psychological disability. Although his memo does mention that in his view psychological entitlement did not appear justified, this decision seems to have been reached on the basis that the complainant may not have fully cooperated with Vocational Rehabilitation Services, rather than on the basis of medical evidence to this effect. In addition, Dr. G. mentioned a possible diagnosis of an inadequate personality; however, this was not suggested in any of the reports rendered by the complainant's treating physicians.

In any event, the matter was referred to a social worker to perform a psycho-social evaluation. Although he agreed to be interviewed, the complainant refused to allow his wife to be interviewed, stating that his claim with the Workmen's Compensation Board had nothing to do with her. As a result, the social worker was unable to render an evaluation, and instead of conducting any further investigation into the matter, Dr. G. wrote a memo dated June 7, 1978, stating that there was no merit for psychological entitlement. It is to be noted that at no time did Dr. G. examine the complainant.

In my view, Dr. G.'s report falls far short of those reports rendered by the complainant's treating physicians, and should not be given the same weight when considering the question of psychological entitlement.

The letter of June 9, 1982 concluded with the following tentative recommendations:

It would appear that it might be open to me to recommend, pursuant to section 22(3)(c) of the Ombudsman Act, that the Appeal Board vary its decision of August 4, 1978, and grant the complainant a permanent partial disability award for his psychological disability.

It would also appear that it might be open to me to recommend, pursuant to section 22(3)(d) of the Ombudsman Act, that in future the Appeal Board restrict its requests to the Medical Branch to medical opinions only, rather than a determination regarding entitlement.

By letter dated August 9, 1982, the Assistant Secretary responded on the Chairman's behalf. He stated that the psychiatric consultant had not made an entitlement decision, but had simply provided the Board with advice concerning the question "of whether or not the complainant suffered from a disabling psychological condition".

With respect to the issue of entitlement itself, the Assistant Secretary stated that the wording used by the Appeal Board was "unfortunate", since the panel had concluded that the complainant did not have a disabling psychological condition, and therefore, the question of a causal relationship did not arise.

The Assistant Secretary suggested that the complainant undergo a psycho-social evaluation, as well as an assessment by the Rating Committee for Major Psychological Disorders, to determine whether any psychological disability currently existed, before arriving at a final position.

On September 8, 1982, this Office wrote to the Assistant Secretary, and requested information concerning the basis of the Appeal Board's decision that the complainant did not suffer from a disabling psychological condition. We were advised, by letter dated September 16, 1982, that the evidence failed to support the existence of such a condition.

The Ombudsman subsequently considered the Board's response to the June 9, 1982 letter on November 24, 1982, at a case conference which he attended with his legal advisors. At that time, he concluded that the Board had satisfactorily addressed the issue of the delegation of powers to the psychiatric consultant. With respect to the issue of psychological entitlement, the Ombudsman agreed with the Board's suggestion that the complainant's psychological condition be reassessed by the Board before any final conclusions were reached.

The investigator spoke to the complainant on November 26, 1982, at which time he agreed to undergo a psychological examination, and his file with this Office was closed.

It was reopened in March, 1983, subsequent to the release of a psychiatric report by Dr. H., who examined the complainant on behalf of the Board. After reviewing his file and examining the complainant, Dr. H. concluded that he did "not feel that psychiatric entitlement is in order nor do I detect any evidence of a psychiatric disorder sufficient to warrant an award".

Accordingly, by letter dated March 29, 1983, the Ombudsman advised the Board, pursuant to section 19(1) of the Ombudsman Act, that the complainant continued to be dissatisfied with the Appeal Board's August 4, 1978 decision, and that we intended to continue with our investigation into his complaint.

Before reaching a final conclusion respecting the complaint, the Ombudsman considered all of the facts involved as outlined in the June 9, 1982 letter; the Board's letters of August 9, 1982 and September 16, 1982; Dr. H.'s psychiatric report dated February 18, 1983; and the results of the assessment carried out by the Rating Committee on Major Psychological Disorders.

It is clear from Dr. H.'s report that he did not consider the complainant to be psychologically disabled at the time of his examination in February, 1983. What he does not appear to have considered is the question of the complainant's entitlement pre-1983, which is of course the subject matter of the complaint. As a result, the Ombudsman did not find the results of Dr. H.'s psychiatric assessment to be persuasive against entitlement. The results did, however, suggest that February, 1983 would be an appropriate termination date for an award for psychological disability.

Accordingly, it was the Ombudsman's opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board, by decision dated August 4, 1978, unreasonably denied the complainant an award for psychological disability.

It is therefore the Ombudsman's recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant the complainant a provisional disability award for a psychological disability from September 1, 1976, the date upon which temporary total disability benefits were terminated, until February 18, 1983, the date of Dr. H.'s psychiatric report.

The Board was notified of the results of the investigation in a report dated July 13, 1983.

In a response dated November 1, 1983, the Board advised this Office that it would not implement the Ombudsman's recommendation because, in its view, the report and subsequent addendum to that report of Dr. H. did not establish the existence of a psychological disability during the period in question.

The Temporary Ombudsman considered the Board's response and determined that there was sufficient evidence to establish the existence of a disability for the period up until Dr. H.'s assessment in February 1983. The Temporary Ombudsman therefore proceeded to report the case to the Premier. On January 9, 1984, the complainant was notified of the results of the investigation and the file was closed.

OMBUDSMAN'S DETAILED REPORT NO.	SUMMARY NO.	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION DENIED	PRESENT STATUS
MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS				
10	7	11, Recommendation 6	That the HUDAC, the Commercial Registration Appeal Tribunal and the Ministry responsible for the Administration of the Act meet and arrange the implementation (of his recom- mendation) and that appropri- ate steps be taken to provide for the payment to (the com- plainant) of his statutory entitlement to compensation.	HUDAC has paid to the complainant \$5,000, which it feels is the ap- propriate amount.
2	60	3, Recommendation 34	MINISTRY OF GOVERNMENT SERVICES That the Ministry pay the complainant the sum of \$1,318.00 for his losses and legal expenses.	The Ministry of Treasury and Economics has responded and pro- posed that the Ombudsman Act is the more appropriate statute for the amendment, since the purpose of the amendment directly relates to procedure under that Act. The Ministry proposed that the Ombudsman Act be amended as follows: "Where the Ombudsman, in a report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to reimburse the complainant for an ascertainable financial loss

CONSIDERED IN
SELECT COMMITTEE
REPORT NO.

OMBUDSMAN'S DETAILED
REPORT NO. SUMMARY NO. RECOMMENDATION DENIED

RECOMMENDATION OF COMMITTEE

PRESENT STATUS

MINISTRY OF GOVERNMENT SERVICES
(cont'd)

11,
Recommendation
4

That the Ombudsman Act be amended as follows: "Where the Ombudsman, in a report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to compensate the complainant for an ascertainable financial loss suffered by him, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum may, where it is less than \$1,000, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is \$1,000 or more, it may be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned."

suffered by him in the matter complained of, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum may, where it is less than \$1,000, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is \$1,000 or more, it may be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned."

The amendment will be included in the package of amendments to the Ombudsman Act which is expected to be tabled in the near future.

MINISTRY OF HEALTH

4	45	That the Ministry consider what changes should be made to the Public Hospitals Act, Sec. 47 in order to give effect to the principle of a more widely distributed membership on the Hospital Appeal Board. That the Ministry Inquire into the provisions of the Public Hospitals Act with a view to preventing acts flowing from Sections 44 to 50 of that Act which may be improperly discriminatory. It was further suggested that this inquiry be assigned to an organization such as the Ontario Council of Health.	5, Recommendation 27	That the Ministry implement as soon as possible the recommendation of the Ombudsman.	On November 5, 1982, the Ministry advised the Committee of a draft of a proposed amendment to Regulation 865 under the Public Hospitals Act, respecting criteria applicable to applications for appointment to a hospital medical staff. It is anticipated that this draft, which satisfies the Ombudsman's recommendation, will be adopted by the middle of 1984.
9	9 and 10	That the Ministry of Health pay that portion of the complainant's claim which would have been an insured benefit had the operation been performed by a plastic surgeon. That s. 43 of Regulation 323/72 of the Health Insurance Act be amended to permit the	10, Recommendation 7	That the Ministry pay that portion of the complainants' claims which would have been an insured benefit had the operation been performed by a physician. That Section 43 of Regulation 323/72 of the Health Insurance Act, 1972 be amended to permit the General Manager to determine the amount of payment for exceptional cases on	The complainants' claims were paid. The Ministry advised that the second recommendation posed practical problems and proposed instead that the Ministry and the Ontario Dental Association meet annually so that the OHIP fee schedule is updated to cover all procedures performed by dental surgeons in hospital.

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION DENIED	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
			<u>MINISTRY OF HEALTH</u> (cont'd)		
			General Manager to determine the amount of payment for exceptional cases where medical procedures are performed by persons in possession of the necessary hospital privileges who are not physicians.	medical procedures performed by persons in possession of the necessary hospital privileges who are not physicians. The Committee intended these recommendations to apply only to members of the Royal College of Dental Surgeons who have obtained the necessary hospital privileges.	
			<u>MINISTRY OF HOUSING</u>		
7	17	8, Recommendation 3		That the Ontario Housing Corporation immediately conduct a review and study of its manuals and the decision-making functions of Housing Authorities in particular for the purpose of amending its manuals to give Housing Authorities more guidance in order that the Rules of Administrative Fairness will be more strictly adhered to.	The Ontario Housing Corporation has instituted an internal review mechanism allowing applicants and tenants to seek reviews of decisions made by local Housing Authorities. They are informed of the reasons for the decision and may appeal it to the members of the Housing Authority.
		11, page 22.		The Committee deferred further comment and consideration of the Corporation's response to the recommendation until it has received and reviewed the field manuals as amended.	The Corporation has issued a new Introduction and new chapters on Housing Development and Tenant Placement.

MINISTRY OF LABOUR

Workers' Compensation Board

38 That the Appeal Board should reconsider its December 15, 1971 decision in the light of (this) report with a view to granting (the worker) entitlement to a permanent disability award for his disability diagnosed as post-traumatic neurosis. Any award should be made retroactive to June 4, 1971 when (the worker's) temporary benefits were terminated.

7 The W.C.B. reconsider, by hearing, its decision of December 15, 1971. In that hearing the Board should at least hear fresh evidence respecting the relationship between the complainant's symptoms and the compensable accident both from the Medical Referee appointed in 1971 and the psychiatrist retained by the Ombudsman during the course of his investigation.

On October 24, 1979, the Board rendered a decision directing that the additional medical report, the detailed summary and recommendation of the Select Committee be referred to the Medical Referee for his further opinion and report. The Medical Referee was to examine the complainant if, in his opinion, such an examination was required. After receiving the Medical Referee's report, the Board reconvened and determined that the policy of benefit of doubt was not appropriate in this case. The Appeal was denied.

8 The Committee in its Eighth Report noted its "grave reservations that the Appeal Board Panel in this matter considered the application of the policy of the benefit of the doubt as intended by the Committee and articulated by the Corporate Board policy itself". After discussing these issues fully with the Board, the Committee intends to report to the Legislature with any appropriate recommendations.

OMBUSMAN'S DETAILED
REPORT NO. SUMMARY NO. RECOMMENDATION DENIED
CONSIDERED IN
SELECT COMMITTEE
REPORT NO. RECOMMENDATION OF COMMITTEE

PRESENT STATUS

MINISTRY OF LABOUR

Workers' Compensation Board
(cont'd)

This case was again discussed during the Committee's hearings in September, 1981.

It was agreed that the Ombudsman and the Board would make submissions on the applicability of the policy of benefit of doubt.

10 The Workers' Compensation Board recon-
vene a hearing on this matter and
consider the evidence of the complain-
ant's physician and the psychiatrist
retained by the Ombudsman first hand
and thereafter decide whether the
policy of benefits should be applied.

In response to the Committee's
recommendation, the Board recon-
vened the hearing on September 20,
1983. A decision was issued on
November 2, 1983, and the Board
determined: "on the balance of
probabilities, that a causal rela-
tionship between (the complain-
ant's) condition diagnosed as post-
traumatic neurosis, and the indus-
trial accident of December 19,
1969, has not been established."
The appeal was again denied.

In its Eleventh Report, the Commit-
tee expressed its intent to receive
further submissions from the Board
and the Ombudsman prior to reaching
a final conclusion.

"The Appeal Board Panel of the Workers'
Compensation Board immediately review
its decision of March 12, 1979 to
determine the reasonable and actual

19 That the Workers' Compensation
Board alter its policy on
attendance allowances and take
into account reasonable costs.

The Board advised the Committee
that it accepted both recommenda-
tions of the Ombudsman. Pursuant
to Recommendation No. 9, an Appeal

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
MINISTRY OF LABOUR				
<u>Workers' Compensation Board</u> (cont'd)				
That the Board revoke its decision and award the complainant an attendance allowance to cover reasonable costs of providing supervision and assistance which his condition necessitates.				
10, Recommendation			costs of providing supervision and assistance which the condition of the complainant requires and if necessary increase the amount of the attendance allowance." (Recommendation No. 9) The Committee also recommended that: "The Workers' Compensation Board review by June 30, 1983, its policy concerning attendance allowances to take into consideration the reasonable cost of providing supervision for those injured workers who, as a result of accident, require someone to be in attendance in order to provide that supervision."	Board Panel reconsidered its decision of March 12, 1979 and concluded that based upon the findings the Board has made respecting the complainant's condition and degree of disability, the \$280.00 currently received as an attendance allowance was adequate to cover the current costs of commercially available attendance. The Board compared the monthly allowance received to the cost of certain commercial services presumably available within a reasonable distance of the complainant's residence. The Board declined to increase the attendance allowance.
				This case was again discussed during the hearings in the summer of 1983.
				The Ombudsman challenged the conclusions of the Board that suitable services were available for the amount of attendance allowance paid. The Committee shared some of the Ombudsman's concern that the Board inquiries were not as complete as required in the circumstances. The Committee was still unable to determine whether or not the Board has properly assessed the

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
---------------------------	-------------------------	-----------------------	---	-----------------------------	----------------

MINISTRY OF LABOUR
Workers' Compensation Board
(cont'd)

actual costs required to meet this complainant's needs. To resolve this issue the Committee accepted suggestions made by representatives of the Workers' Compensation Board:

First, if the complainant's wife confirms that she intends to obtain full-time employment, then the Workers' Compensation Board shall fund the entire cost of providing the necessary persons or person to attend to the complainant as his needs require when his wife is out of the home at work.

Secondly, and in any event, the Workers' Compensation Board will immediately assemble a treatment team from their Head Injury and Neurology Clinic and undertake all necessary discussions with the complainant's family physician with a view to reconciling the different views respecting the actual attendance needs of the complainant.

Thirdly, after that reconciliation has been done, the Board shall, at its expense, take all necessary steps to identify and provide an individual to attend the home and render the necessary attendance allowance.

CONSIDERED IN
SELECT COMMITTEE
REPORT NO.

OMBUDESMAN'S DETAILED
REPORT NO. SUMMARY NO. RECOMMENDATION DENIED

PRESENT STATUS

RECOMMENDATION OF COMMITTEE

MINISTRY OF LABOUR

Workers' Compensation Board
(cont'd)

9	20	That the Board should cancel its decision and reconsider exercising the discretion provided by section 42 [now 43] of the <u>Workers' Compensation Act</u> .	10, Recommendation 11	"The Appeal Board Panel cancel its decision of July 4, 1979, grant the complainant a new hearing and reconsider his entitlement in this claim exercising the discretion given it under section 43 of the <u>Workers' Compensation Act</u> ."	The Committee intends to discuss the Board's implementation of these steps when it next conducts its hearings.
9	21	That the Board revoke its decision and grant the complainant the full assessed value of his permanent partial disability award.	10, Recommendation 12	"The Appeal Board Panel of the Workers' Compensation Board revoke its decisions of October 3, 1978 and grant the complainant the full assessed value of his permanent partial disability pension recognizing the non-organic component of his disability up to the date the complainant left Canada permanently."	In response to the Committee's recommendation, a new hearing was held on March 26, 1984. A decision by the Board has not yet been rendered.
			10, Recommendation 13	The Committee also recommended that: "The Workers' Compensation Board assess and decide whether the complainant	The Board has implemented Recommendation 12.
					The Board interpreted Recommendation 13 to mean that it should consider the increased award after the

OMBSMAN'S DETAILED REPORT NO. SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
	<p data-bbox="243 335 315 449"><u>MINISTRY OF LABOUR</u> <u>Workers' Compensation Board</u> (cont'd)</p>			
9	<p data-bbox="347 335 481 449">22 That the Appeal Board reconsider its previous decision with a view to granting the complainant a temporary supplement to his permanent partial disability, on the basis of a full consideration of the appropriate test for entitlement to such benefit.</p>	<p data-bbox="347 763 481 878">11, Recommendation 1</p>	<p data-bbox="347 1106 481 1220">should have continuing entitlement to the increased amount of the pension after the date he left Canada permanently."</p> <p data-bbox="347 1220 481 1335">That the Workers' Compensation Board pay the complainant the increased pension amount from the date he left Canada until such time as it decides entitlement is no longer appropriate, based upon a personal assessment of the complainant either in Canada or in the country where he currently resides.</p>	<p data-bbox="347 1413 481 1428">claimant left Canada only after a reassessment had been conducted. In its Eleventh Report, the Committee clarified this recommendation.</p> <p data-bbox="347 1428 481 1428">The Board has not yet responded to the Committee's further recommendation.</p>
9		<p data-bbox="523 763 657 878">10, Recommendation 14</p>	<p data-bbox="523 1106 657 1220">"The Workers' Compensation Board reconsider its decision of July 24th, 1980 and its decision of November 9th, 1981 with a view to granting the complainant a temporary supplement to his permanent partial disability award on the basis of a full consideration of all relevant evidence and factors."</p>	<p data-bbox="523 1413 657 1428">The Board advised the Committee that it had accepted the recommendation in the Tenth Report and issued a decision dated September 20, 1983. In that decision, the Board purported to have considered all the relevant factors, but again denied entitlement to a supplement under section 43(5) of the Act.</p>

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NO.	RECOMMENDATION DENIED	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
<div data-bbox="253 32 326 1428"> <p>MINISTRY OF LABOUR</p> <p><u>Workers' Compensation Board</u> (cont'd)</p> <p>That the Board provide reasons for its decision following the reconsideration.</p> <p>11, Recommendation 2</p> <p>That the Workers' Compensation Board reverse its decision of September 20th, 1983 and grant the complainant a temporary supplement to his permanent partial disability award.</p> <p>During the hearings before the Committee in the summer of 1983, the Ombudsman asserted that although the original language of his recommendation was lacking in precision, it was clearly his intention that the Board grant the complainant benefits. In the Ombudsman's view, the Board had continued to deny the recommendations of both the Committee and the Ombudsman.</p> <p>Following these deliberations, the Committee in its Eleventh Report made a further recommendation that benefits be awarded. This recommendation has not yet been addressed by the Workers' Compensation Board.</p> </div>					

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22(3) (d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS							
10	7	That the Tribunal and Ministry reconsider the law on which the Ministry's decision was based, and take appropriate steps to amend the regulations to comply with the Ontario New Home Warranties Plan Act.	February 23, 1983	Deputy Minister stated his intention to recommend the revision of the regulation and to reconsider the entire Act at the earliest opportunity.	11, Recommendation 5	That the Ministry of Consumer and Commercial Relations reconsider the law on which the complainant's decision was based and, with HUDAC, take all appropriate steps to amend the regulations to comply with the Ontario New Home Warranties Plan Act.	Section 6(1) of Regulation 726, R.R.O. 1980, has been replaced by: "The purchaser who has a claim under clause 14(1) (2) of the Act in respect to a purchase agreement is entitled to be paid out of the guarantee fund the amount of all deposits owing by the vendor to the purchaser under an agreement of purchase and sale to a maximum of \$20,000."
MINISTRY OF EDUCATION							
2	47	That a more comprehensive insurance policy be made available to students, one which would provide compensation for injuries resulting in the loss of future earning power.	May 4, 1977	Deputy Minister took steps to meet with insurance industry representatives regarding more comprehensive insurance for students.	3, Recommendation 23	That the Ministry forthwith pursue its discussions with the Insurance industry and other interested parties for the purpose of developing an appropriate contract of insurance in the indemnity type at a realistic premium which would adequately compensate a pupil for injuries sustained in the case of a pure accident as the result of participation in shop	The Ministry has amended s. 8(1)(1) of the Education Act as follows: "The Minister may (i) prescribe the conditions under which and the terms upon which pupils of boards shall be deemed to be employees under the Workers' Compensation Act, deem pupils to be employees for such purpose and require a board to reimburse Ontario for payments made by Ontario under that Act in respect

OMBUSMAN'S REPORT NO.	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22 (3) (d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
--------------------------	-------------------------------	--	---------------------	-----------------------	--	------------------------------------	----------------

MINISTRY OF EDUCATION
(cont'd)

						classes and in organized athletic activities.	of a pupil of the board deemed to be an employee of Ontario by the Minister.* The Ministry's statistical branch has provided information on enrolment and hours of risk for students in shop classes and organized athletics. The Ministry will use the information in meeting with the insurance industry to explore the costs of an insurance policy.
	11, 3	Recommendation 3				That recommendation 23 of its Third Report be implemented by the Ministry of Education by means of a policy of insurance on a province-wide basis before the end of 1984.	

MINISTRY OF
GOVERNMENT SERVICES

2	57	That the Public Service Superannuation Act be amended in order to eliminate all restrictions on the re-employment of provincial superannuates except where the nature of their re-employment is such that they resume contribution to the Public Service Superannuation Fund.	Aug. 31, 1976	Executive Secretary of the Civil Service Commission agreed to recommend to Management Board of Cabinet changes in Public Service Superannuation Act.	3, 24	Recommendation 24	That the Ministry table appropriate legislation in the Legislature during the current session removing the present restriction on the total current earnings of a provincial superannuate.	Amendment to s. 16 of the Public Service Superannuation Act is currently being prepared by the Benefits Policy Branch of the Civil Service Commission and is expected to be before the Legislature next session. The amendment has been delayed, with proposed changes to other pension plans, until the governmental review of the pension industry is completed.
---	----	---	---------------	--	----------	-------------------	--	--

DETAILED OMBUDSMAN'S SUMMARY REPORT NO.	RECOMMENDATION UNDER SECTION 22(3) (d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
<p align="center"><u>MINISTRY OF GOVERNMENT SERVICES</u> (cont'd)</p>						
				11, page 20.	The Committee made no recommendation but urged that Ministry and government table the amendment as quickly as possible.	It was subsequently decided not to proceed with the proposed amendment. This issue is seen as part of the larger issue of mandatory retirement age in light of the Canadian Charter of Rights and Freedoms. The effects of abolishing a mandatory retirement age are being studied by the Ministries of the Attorney General and Labour.
<p align="center"><u>MINISTRY OF HEALTH</u></p>						
3	40	May 4, 1977	Agreed to implement recommendation.	5, page 32.	The Committee considered this complaint for the purpose of following up with the Ministry as to the implementation of the Ombudsman's recommendation as set out at pages 177 and 178 of the Ombudsman's Third Report.	Necessary amendments have yet to be enacted. The Interim proposed the Interim arrangement whereby on any call for proposals the Ministry will undertake to the successful proposer that he be awarded a licence provided he constructs and establishes the home in accordance with the Nursing Home Act and regulations. This interim arrangement was acceptable to the Ombudsman.
				11, page 21.	The Committee accepted the interim arrangement on the understanding that the Act will be amended at some time in the future.	

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY	RECOMMENDATION UNDER SECTION 22(3) (d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
4	45	<p>MINISTRY OF HEALTH (cont'd)</p> <p>by the Ministry prior to the granting of an unconditional licence.</p> <p>That the Ministry consider what changes should be made to the Public Hospitals Act, Section 47 in order to give effect to the principle of a more widely distributed membership on the Hospital Appeal Board. That the Ministry enquire into the provisions of the Public Hospitals Act with a view to preventing acts flowing from Sections 44 and 50 of that Act, which may be improperly discriminatory. It was further suggested that this inquiry be assigned to an organization such as the Ontario Council of Health.</p>	Jan. 1978	<p>The Deputy Minister took the position that decisions of hospital boards and the Hospital Appeal Board in general do not fall within the jurisdiction of the Ombudsman and for that reason the Ministry could only accept the Ombudsman's comments and recommendations as informal observations and suggestions.</p>	<p>5, Recommendation 27</p> <p>6, Recommendation 1</p>	<p>That the Ministry of Health implement as soon as possible the recommendation of the Ombudsman.</p> <p>That the Ministry of Health consider what changes should be made to the Public Hospitals Act and Section 47 in particular, including changes in the quorum provisions and length of membership respecting the Hospital Appeal Board. Further, the Ministry of Health cause an inquiry to be made into the provisions of the Public Hospitals Act to identify and correct any acts flowing from Sections 44 to 50 of the Act which may be improperly discriminatory.</p>	<p>On November 5, 1982 the Ministry advised the Committee of a proposed amendment to Regulation 865 under the Public Hospitals Act respecting criteria applicable to applications for appointment to a hospital staff. It is anticipated that this draft, which satisfies the Ombudsman's recommendation, will be adopted by the middle of 1984.</p>
					8	<p>The Committee reminded the Minister of Health "that to the extent that</p>	

OMBUDSMAN'S REPORT NO.	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22(3) (d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
---------------------------	-------------------------------	---	---------------------	-----------------------	--	------------------------------------	----------------

MINISTRY OF HEALTH
(cont'd)

the Council of Health identifies appropriate legislative change and so recommends to the Minister, the Committee will view those legislative changes as necessary to fully comply with the recommendations in its Sixth Report".

MINISTRY OF LABOUR

Workers' Compensation Board

2	132	That the Board either request jurisdictional determination from the courts or request that the Workers' Compensation Act be amended to give the Board the power to both collect and offset overpayments.	3, 31	Recommendation	Amend the Workers' Compensation Act to provide for statutory authority to recover or write off overpayments.	Recommended amendment has yet to be enacted.
---	-----	--	----------	----------------	--	--



The Ombudsman | Ontario

CA 20N
QM
- A56

THE OMBUDSMAN OF ONTARIO

10th ANNIVERSARY

ANNUAL REPORT
1984-85

VOLUME I





The Ombudsman | Ontario

DANIEL G. HILL
OMBUDSMAN

125 QUEEN'S PARK, TORONTO, ONTARIO
M5S 2C7
TELEPHONE (416) 596 3300

June 28, 1985

The Speaker
Legislative Assembly
Province of Ontario
Queen's Park
Toronto, Ontario

Dear Mr. Speaker:

It is an honour and a pleasure to present the Twelfth
Annual Report of the Ombudsman for the period April 1, 1984
to March 31, 1985.

This report is submitted pursuant to section 12 of the
Ombudsman Act.

Yours sincerely,

Daniel G. Hill



DR. DANIEL G. HILL

OMBUDSMAN'S MESSAGE

For ten years the citizens of Ontario have enjoyed the protection of an Ombudsman. This tenth anniversary year is a time for celebration, for expressions of appreciation, and for sober self-evaluation.

We are right to celebrate the Ombudsman institution, because much has been accomplished during the past decade. We have constantly refined and improved our capacity to handle complaints, which is the vital core of the Ombudsman's responsibilities.

Citizens' use of our services has increased as the Ombudsman has become better known throughout the province. During our first few years of operation, complaints and information requests averaged about six-and-a-half thousand a year. Last year's total was close to fourteen thousand.

We have become adept at referring citizens to the services they need, even when their

complaints are beyond our jurisdiction. No one leaves our Office without at least a start on a solution to his or her problem.

Many of our recommendations have had important consequences both for complainants and for provincial government agencies. For a large number of citizens, our intervention has been critical to reestablishing a sense of well-being and participation in community life. Our work has also frequently led to vitally important financial compensation for complainants who have to rely on government allowances for their basic income.

Our work has had an impact beyond the resolution of individual problems. On many occasions, we have convinced Ministries to change or clarify procedures and policies which were inequitable or needlessly complicated. In some cases, our recommendations have prompted the government to amend its legislation and regulations.

We are proud of the fact that the Office of the Ombudsman has assumed a significant role in public life. Citizens can feel confident that the Ombudsman will give them a full hearing, and strive to redress grievances if they are found to be justified.

I am pleased to report on a recent example where a complainant, on behalf of the residents of a remote Ontario Township, approached this Office for help when their petitions to Ontario Hydro to provide their community with electrical service were refused on the grounds that the number of residents did not justify the cost. This community, of less than one hundred mostly poor, Non-Status and Metis Indians, was living in near-primitive conditions without electricity. Although in the past this Office had closed the file on this complaint, I ordered that the investigation be reopened and personally pursued the matter with the Chairman of Ontario Hydro. I have now been informed by the Chairman that Ontario Hydro will be revising its customer density regulations and the Township will now be provided with electrical service at a reasonable cost.

I regret that I must be brief in my expressions of respect and appreciation, because there are many colleagues and friends who merit a special word of thanks.

Everyone at the Ombudsman's Office was deeply saddened at the death last year of Mr. Arthur Maloney, Q.C., Ontario's first Ombudsman. Mr. Maloney approached his work with a drive, intelligence and enthusiasm that are an inspiration to all his successors. It was his pioneering efforts that made the Ombudsman a force to be reckoned with in community affairs.

I express my appreciation to my colleagues in the Canadian Ombudsman community who were very gracious to share their counsel and experience with me.

I express my gratitude to the competent and committed staff who have assisted and advised me so ably in the last year. The people of Ontario can be proud of the men and women of this Office who work so hard on their behalf.

I also want to express my appreciation for the fine work of Ontario's seventy thousand civil servants. I have seen enough of their efforts to know how careful and conscientious they generally are in their dealings with citizens. I am impressed by the professionalism and probity of our public servants and by how seldom the actions of Ontario's officials provoke dissatisfaction and complaint.

As we pause for self-evaluation at the ten-year milestone, we see challenges ahead. Our most pressing need is to continue increasing public access to our Office. I am currently implementing a two-fold plan to strengthen our presence throughout the province. We are moving ahead with a decentralization plan that has already started to take shape through the five regional offices we have opened in Ottawa, Thunder Bay, North Bay, Timmins and Kenora. We have also undertaken a vigorous program of public education which includes the publication of a regular newsletter, multilingual fact sheets, and numerous other materials.

Community meetings have been held in locations across the province with the support of local and voluntary organizations. I and many members of my staff have participated in almost 300 speaking engagements in the last year throughout the province.

Also, we have made a conscious effort to make our staff more reflective of the new Ontario — multilingual, multiracial, and multicultural. I am pleased to report that we have recently added to our multilingual personnel staff members who can communicate with Native people in Cree, Oji-Cree and Ojibway.

Another challenge that this Office must address is the issue of systemic problems that come to our attention in the workings of governmental organizations. For example, in our dealings with the Workers' Compensation Board this issue has come to the forefront, and I refer the reader to my Introductory Remarks in this Report for a full explanation.

In our tradition of parliamentary democracy we affirm the equality of all people before the law. I believe this includes the right of citizens to enjoy fair and equal treatment from government authorities. This, I believe, was also the intent of our Legislature when it passed the Ombudsman Act in 1975.

The Ombudsman was originally a Swedish institution. The original Swedish word "Justitiombudsman" means "people's agent for justice". The Ombudsman's main function is the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved.

In exercising this function, the Office of the Ombudsman has become an important link in the network of human rights codes and statutes that includes the United Nations Universal Declaration of Human Rights and Canada's Charter of Rights and Freedoms. The full significance of the Ombudsman can be understood only in this context. As we enter our second decade, I am keenly aware of my responsibility to uphold the human rights of all Ontarians so that the Ombudsman will continue to serve as an authentic agent for justice.

During my first year in office, I have become increasingly aware of the large number of requests for assistance from citizens with complaints against federal government agencies. These matters are outside my jurisdiction as provincial Ombudsman. While my staff makes every effort to refer citizens with complaints of a federal nature to the appropriate agency or person, I am convinced that there is a glaring need for a federal Ombudsman.

For example, matters concerning health and welfare, delays in qualifying for or receiving veterans' benefits, unemployment insurance or income tax refunds, are all under federal jurisdiction — to name only a few.

Further, many of the issues affecting Native people are outside the jurisdiction of a provincial Ombudsman. I need not recite the

litany of past and present injustices done to our First Peoples — most concerned Canadians are well aware of them. To the concerned citizen, injustice cries for remedy. We can only take pride in our strides toward a just society if no one is left behind.

Ontario has had an Office of the Ombudsman for a decade. Let us delay no longer in creating a federal Office of the Ombudsman. I firmly believe that a federal Ombudsman would be of the utmost benefit to all Canadians.

There is another challenge that I wish to address, one that I believe is equally pressing and important.

Five years ago my predecessor, the Honourable Donald R. Morand, proposed a number of amendments to the Ombudsman Act to the Attorney General for his consideration.

When I became Ombudsman in 1984 I reviewed the still-outstanding proposed amendments and added several more which I considered to be of supreme importance to the better functioning of the Office of the Ombudsman. The effect of some of these amendments would permit the Ombudsman to more effectively perform his investigative function for the benefit of the people of Ontario.

The Ombudsman has often been criticized by complainants, members of the Legislature, and others, because he does not publicly discuss complaints which might be of public interest. For example, issues that could involve the payment of large amounts of money or that could affect a large segment of the population illustrate that the people have a right to know what the Ombudsman is doing and why he is doing it. I totally agree.

However, as many who have dealt with my Office know, the Ombudsman Act imposes a duty of secrecy that prevents me from publicly commenting on these and other matters.

One of my most important recommendations will allow me to make a special report to the Legislature or to comment publicly on matters about my responsibilities or investigations when I believe it is in the public's interest or the government's interest.

Another of my major concerns is the lack of public awareness and understanding about the Office of the Ombudsman. For the citizen to use the Ombudsman, who is one of the most important safeguards protecting the people from

government maladministration, the citizen must know about him.

I have made a start in increasing the level of public awareness and knowledge through my public education programs. But much more must be done.

Regrettably, the Ombudsman Act does not address this critical need of public education. One of my proposed amendments will remedy this if it is approved. It will make the Ombudsman responsible for providing and conducting programs of public education and information.

Another amendment involves financial compensation. From time to time the only way of rectifying a wrong done to a citizen is to pay him or her money. There are some situations where the government is willing to pay but is unable to do so because it lacks the necessary statutory authority. Through the cooperative efforts of the Select Committee on the Ombudsman and the Treasurer of Ontario, an amendment was agreed to by all concerned that would permit the payment of money where no other legal authority was available. This important amendment will allow the Ombudsman and the government to give full effect to recommendations where money should be paid to correct an injustice.

Finally, as this Office enters its second decade, I believe it is an appropriate time to consider whether or not other areas of governmental activity should be subject to the Ombudsman's investigative responsibility. During the last ten years, the Office of the Ombudsman has received hundreds of complaints about the actions and decisions of municipalities, public hospitals, universities, conservation authorities, children's aid societies, farm products marketing boards, and the Ontario New Home Warranty Program. These are all bodies that receive provincial funding or are under various degrees of regulatory control by the province, but are not within the Ombudsman's jurisdiction.

Previous Ombudsmen have considered their jurisdiction over these agencies and concluded they were not subject to the Ombudsman's investigative authority. Citizens who have complained about such organizations have been referred elsewhere, often with reluctance by the Ombudsman's staff because of our commitment and desire to help all who seek our assistance.

As the incumbent Ombudsman, I invite members of the Legislature, the Select Committee on the Ombudsman, and any groups or individuals

interested in this issue, to meet with me to discuss the merits of expanding the Ombudsman's jurisdiction.

I am confident that the Office of the Ombudsman is well-established and ready to serve the people of this Province as requested.

However, I will not ask the Legislature and the public to expand the Ombudsman's jurisdiction in other areas of governmental activity until a process of full and frank discussion has been completed, and a consensus has been reached about the utility of such an expansion of the Ombudsman's role in the public sector of this Province.

I am honoured to serve as the Ombudsman of Ontario, and it is my hope to give substance to words, and to take positive, constructive action in all of my endeavours.

A handwritten signature in dark ink, reading "Daniel G. Hill". The script is cursive and fluid, with the first letters of each word being capitalized and prominent.

Daniel G. Hill

HIGHLIGHTS

This is the twelfth occasion for tabling an Annual Report in the Legislative Assembly. The report deals with the activities of the Ombudsman's Office from April 1, 1984 to March 31, 1985.

- This report is published in two volumes. Volume I is an overview of the operations of the Ombudsman. Volume II deals with recommendations made by the Ombudsman that were denied by various governmental organizations.
- Legislative amendments to the Ombudsman Act are outlined for discussion. (p. 3)
- A summary of the major reorganization of the intake and investigative functions of the Office is detailed. (p. 7)
- Improved management techniques have been implemented and others proposed. (pp. 9-10)
- A new outreach program has been started with the aboriginal communities and organizations in Ontario. (p. 10)
- A new emphasis has been placed on regionalization to make the Ombudsman more accessible. (p. 10)
- A comprehensive communications and public education program is now in operation to make the Ombudsman better known. (p. 11)
- Conciliation and mediation techniques are utilized to resolve issues and reduce confrontation with governmental agencies. A new initiative with the Ministry of Correctional Services is outlined. (p. 11)
- Solutions are proposed for systemic problems with the Workers' Compensation Board. (p. 11)
- The Ombudsman's jurisdiction is again challenged by a governmental organization. (p. 13)
- Statistical Information presented includes the disposition of all complaints handled by this Office in fiscal year 1984-85. (pp. 17 to 20)
- Budgetary expenditures including the budgetary planning process are presented. (p. 20)
- This report marks the tenth anniversary of the Office of the Ombudsman of Ontario. It includes a special remembrance of its founder, Mr. Arthur Maloney, Q.C. (p. 39)

TABLE OF CONTENTS

	Page
Ombudsman's Message	1
Highlights	5
Introduction	7
Fiscal Year 1984-85	7
Reorganization	7
Salary Administration	9
Grievance Procedure	9
Managing By Results	9
Staff Training and Development	9
Performance Appraisal	10
Native Programs	10
Regionalization	10
Communications and Public Education	11
New Initiatives	11
Meetings with the Ministry of Correctional Services	
Systemic Problems — the Workers' Compensation Board	
Supreme Court of Canada, British Columbia Ombudsman	12
Jurisdictional Challenge	13
Special Reports	13
International Ombudsman Conference	13
Case Summaries	14
Statistical Information	17
Budget Expenditures	20
Recommendations Denied	36
Ontario Ombudsman Staff	37
Language Facilities	38
Ontario Ombudsman Offices	38
In Memoriam — Arthur Maloney, Q.C.	39

INTRODUCTION

This report covers the fiscal year from April 1, 1984 to March 31, 1985.

The Annual Report has been divided into two volumes.

Volume I provides an overview of our last fiscal year and includes a selection of case summaries which illustrate the varied complaints that come before the Ombudsman.

Volume II is devoted entirely to detailed summaries of recommendation-denied cases and tables of all recommendations outstanding from past reports. Volume II will be made available to any interested reader.

FISCAL YEAR 1984-85

In commenting on the past fiscal year, 1984-85, I am pleased to report that our trend toward greater efficiency is still continuing. There was no significant change from the previous year in the number of complaints and information requests received (13,458). These included 5,366 jurisdictional complaints, 5,048 non-jurisdictional complaints, and 3,044 information requests.

During the past year, the statistical record-keeping functions of this Office were reviewed for the purpose of presenting statistical information that is simple, accurate, readable and more reflective of the work performed.

In the "Statistical Information" section of this report, I have discontinued many of the graphs presented in previous reports in favour of what I believe to be more relevant and reflective information; namely, the number of complaints we received, and how those complaints were handled.

When our new computerized data and word processing system comes on-line, more detailed statistical analyses will be available for the benefit of the Select Committee on the Ombudsman.

We have already reorganized the word processing functions in the Office and the turn-around time for word processing assignments has been reduced from over a week to two or three days.

REORGANIZATION

Early in the fiscal year, it became apparent that a new office structure was needed to improve efficiency, case handling and morale. After a careful process of study and discussion, a system has now been introduced which emphasizes the investigation process as the central aspect of our work. This system features a new way of working and improved support services for investigators.

Office reorganization began with the hiring by tender of management consultant Marshall Pollock, formerly Assistant Deputy Minister to the Attorney General. He was asked to study the current structure and recommend changes. I accepted his October, 1984 report as the framework for reorganization.

An Implementation Task Force of seven staff members was appointed to work with Mr. Pollock. The Task Force consulted with staff and met on 11 occasions to discuss its work. In early March, we received the Task Force's final report from Mr. Pollock.

The proposed new structure provides for five Investigative teams and one Intake and Information team. The team organization corresponds to policy fields which formerly were handled by individual investigators. One team, for example, includes labour-related issues such as Employment Standards, the Labour Relations Board, and the Grievance Settlement Board.

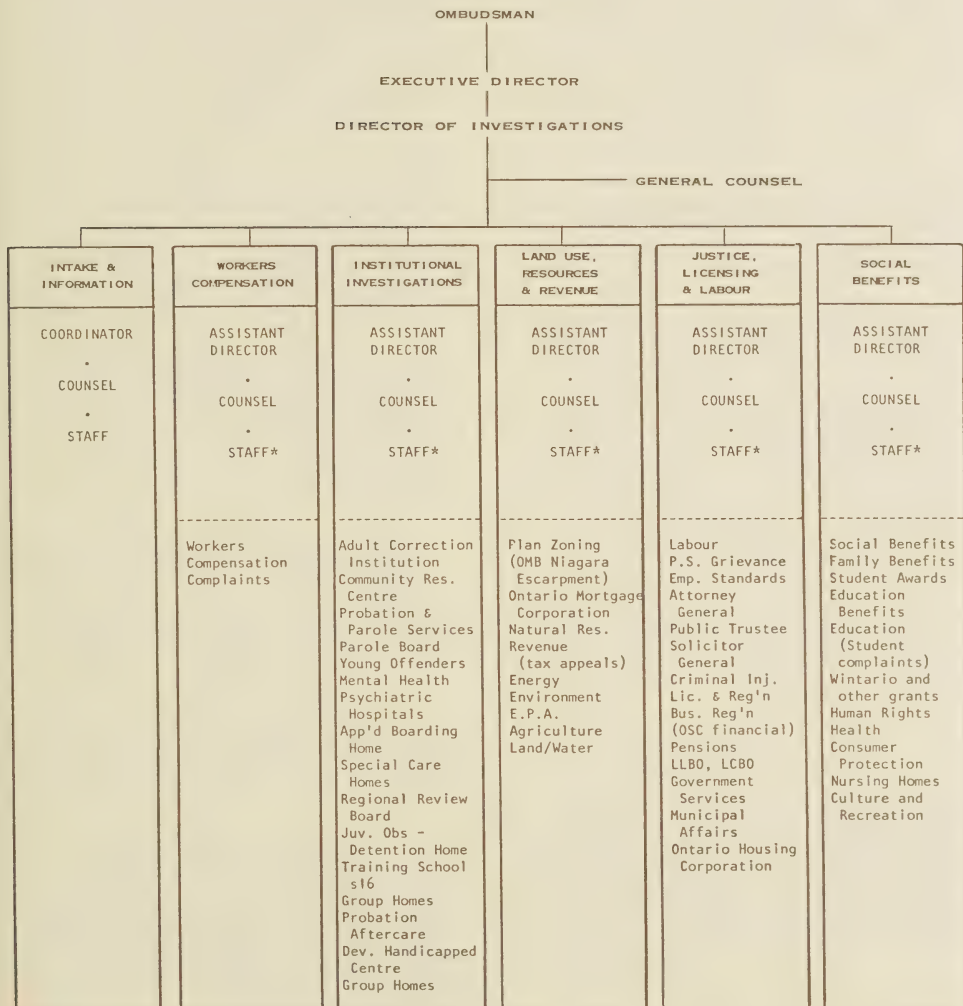
The report also recommended the dissolution of the Legal Directorate, and advised that lawyers instead participate in investigative teams. The need for a new position of General Counsel — the Office's senior legal advisor — was also outlined in the Task Force report and subsequently adopted.

We held additional meetings with senior staff and members of each new team to elicit cooperation and advice in the implementation of the new organization. A physical reorganization of the Office to conform to the new system was completed in April, 1985. The Office was redesigned to give investigators more privacy and to improve working relationships. Prior to the relocation, 47 investigators had nine private offices; they now have 23.

The teams are currently working out new case-handling procedures. Their chief emphasis

Reorganization

REORGANIZATION CHART - INTAKE AND INVESTIGATIONS



*Staff includes: Senior Investigators, Investigators, Research/Investigators, Administrative Assistants, Clerical Assistants, Word Processors.

is on speed in casework, without sacrificing quality in professional case-handling.

My next step is reorganization of our Regional Offices. I am considering a regional plan to service the entire province, which will be developed over the next few years.

The Office structure and policy areas are illustrated in the chart on page 8.

SALARY ADMINISTRATION

In an effort to introduce a fair and equitable salary classification system, I had each position in the Office (including the Regional Offices) classified according to its job description. Salary ranges were then assigned to each job category.

The system was patterned after the classification system in the Ontario Civil Service. Now, positions in the Office of the Ombudsman can be compared to similar positions across government, and employees are aware of the salary ranges and job specifications for every position in the Office. Each position was classified and examined to determine if its present salary fell within the new salary classification range. Where a position was found to be in a higher salary bracket than the assigned range, the employee's salary was red-circled (i.e., frozen). Where a position was found to be below the range, salary adjustments were made to bring the salary into the range.

The new salary classification system underlines my commitment to fair treatment, not only in the Province at large, but also within the Office of the Ombudsman.

GRIEVANCE PROCEDURE

Prior to this year this Office had no grievance procedure. To remedy this situation I asked for and received reports and submissions which are currently under consideration. It is my intention to implement an equitable and comprehensive grievance procedure for this Office before the end of the fiscal year.

MANAGING BY RESULTS

To carry out my mandate, I need a competent staff and an adequate budget. However, I must also have a sound system of fiscal and management control in order to make the best use of my staff and the public's money. I have already adopted the Ontario Manual of Administration as a guideline for compliance with policies and procedures.

To ensure the economy, efficiency and effectiveness of the services we provide, I have implemented a planning and budgetary process that involves the participation of all levels of management, from the beginning of the budgetary planning process to their accountability for achieving results. Much of the philosophy for our planning and budgeting practices will be based on the Ontario Public Service's management series booklet, "Operational Planning, Budgeting and Reporting Processes."

In specific terms, the Office has adopted the concept of Managing by Results (MBR). This concept places equal emphasis on resources and results. MBR will provide a formal record of expected results against which to measure actual performance expressed in terms of client-complainant benefits.

STAFF TRAINING AND DEVELOPMENT

With the myriad of complaints which come to my Office, I am aware of the need for a highly professional and well-trained staff. For this reason, I created the position of Chief, Staff Training and Development in August, 1984.

The incumbent serves as a human resources person to advise staff wishing to upgrade their qualifications and to arrange training programs for managers, line staff and support staff.

With the opening of District Offices in Timmins and Kenora, I realized the need for a Training Manual for field staff. This has now been completed. In addition the Chief, Staff Training and Development is also preparing an Orientation Manual for the entire organization, and rewriting the Ombudsman's Administrative Procedures Manual outlining internal Office policies and procedures.

PERFORMANCE APPRAISAL

Shortly after assuming my responsibilities, I realized the need for an equitable system of performance appraisal for staff members. I asked the Chief, Staff Training and Development to consult with various Ministries and to assist in the design of a system suited to the needs of this Office. The new system will be tailored to a Management by Results (MBR) philosophy. The system will be introduced during the summer of 1985 once the training of managers has been completed.

NATIVE PROGRAMS

In order to give all aboriginals an equal opportunity to utilize our Office, I have appointed a Native Programs Officer who is responsible for my outreach initiative to encourage Native people to use our services.

My intention is eventually to consult with all provincial aboriginal leaders — Status, Non-Status, Metis and Inuit — and make contact with all the Native organizations in Ontario.

This program is now well underway. To date we have met with the following organizations:

Native Council of Canada
Ontario Native Council on Justice
Ontario Federation of Indian Friendship Centres
Union of Ontario Indians
Association of Iroquois and Allied Indians
Ontario Native Women's Association
Grand Council Treaty 3
Nishnawbe-Aski Nation
Ontario Regional Liaison Council

Later this summer I intend to start a series of personal visits to establish contact with some of the more remote reserves in Ontario.

REGIONALIZATION

I have set a high priority on making this Office as accessible as possible to all of Ontario. To fulfil a commitment I made when I assumed the position of Ombudsman, I opened District Offices in Timmins and Kenora in this fiscal year. As both of these areas have a large Native

population, I felt that the community would best be served by staff members who speak at least one Native language. My District Officer in Kenora speaks both English and Oji-Cree, the predominant language in that district. Since Timmins also has a large Francophone population, my District Officer there speaks French and Cree in addition to English.

I am confident that both of these Offices will soon become well-established and effective in their communities.

But District Offices are only one method of improving accessibility. Over the past year I have, together with my senior staff, explored a number of ways to reach out beyond our current regional structure.

We have looked at creating additional satellite or branch offices, but are deterred by the cost of the infrastructure required to establish and maintain them.

We have examined the "private hearing" format in which an itinerant representative of the Ombudsman travels to remote areas of the province in accordance with a predetermined schedule. We concluded that the cost-benefit of this format did not warrant its continuation.

We have tried the *ad hoc* approach of sending a representative to a trouble-spot when the need arose. While it proved effective in dealing with the more remote areas of the province, it was extremely costly and did not satisfy the need for a more permanent presence in the community.

To satisfy this need I am presently reviewing reports prepared by one of my staff who operated as Chief, Regional Planning and Development, and by the management consultant, Mr. Pollock. I will be considering a number of other options including the idea of a resident local agent or Ombudsman's representative who could, on a part-time basis, act as a liaison person in a number of communities across the province.

We have been heartened by the number of voluntary and public agencies who have offered us low-cost accommodation to locate in their communities.

COMMUNICATIONS AND PUBLIC EDUCATION

Soon after my appointment I created, within the existing resources of this Office, a Directorate of Communications and Public Education in the belief that worse than not having an Ombudsman is to have one that nobody knows about.

This Directorate has launched a number of public education initiatives. These have included the publication of our quarterly newsletter, "Equal Times"; our bilingual Annual Reports; and a pamphlet entitled "The Ombudsman of Ontario — At Your Service". In addition we have produced multilingual fact sheets in Italian, Greek, Portuguese, Spanish, Vietnamese, Finnish, Polish, Croatian, Serbian and Hindi, among others. Supplementary audiovisual materials are presently in production. A 24-hour telephone answering service has been introduced at our Toronto location. This Directorate has also put into service a mobile information-display unit where a staff member is available to distribute information and receive complaints. Launched successfully at City Hall in Toronto, this unit is being used in various locations in Ontario.

Public meetings on the role and function of the Ombudsman, organized in cooperation with local community and voluntary groups in locations where we do not have offices, is another ongoing program.

As much use as possible is made of the media. This includes public service radio announcements, participating in open-line talk shows and community cable TV programs, as well as soliciting media coverage via interviews and press releases.

All requests for speaking engagements and invitations to attend community functions are accepted whenever possible and all groups are welcome to tour our facilities.

NEW INITIATIVES

MEETINGS WITH THE MINISTRY OF CORRECTIONAL SERVICES

During the past year, senior members of my staff have met every two months with senior officials of the Ministry of Correctional Services to discuss complex cases. The objective is to try to resolve worthy cases which my investigators were

unable to resolve at the local level with institutional staff before a final report is issued. I am pleased to report that the committee has been successful in coming to agreement in cases dealing with issues such as:

- permitting inmates charged with drinking alcohol to request urinalysis tests to prove or disprove the charge.
- advising inmates, who have lost the right to earn remission due to misbehaviour, of their rights of appeal.
- the right of inmates to be paid interest on money held for them by the Ministry.

These meetings are proving to be extremely valuable and I am hoping to introduce this procedure with other Ministries in the near future.

SYSTEMIC PROBLEMS — THE WORKERS' COMPENSATION BOARD

This year, as in previous years, complaints against the Workers' Compensation Board account for the majority of my recommendations which have been denied. I believe it is incumbent upon me to point out two major areas of concern that account for some of our ongoing disagreements.

In my opening remarks to the Select Committee last year, I pointed out some systemic problems of the Workers' Compensation Board. In particular, I noted that the Board, when reaching decisions and drafting policy, does not always avail itself of legal advice or concern itself with case law in appropriate cases. This problem is highlighted by Detailed Summary No. 14 in Volume II.

In that case, the worker did not suffer an accident in the commonly understood sense, but in my opinion, suffered a disability which arose out of his work as a crane operator. He did not receive any compensation from the Board. There are various court decisions which hold that this type of disability is compensable. The Board denied entitlement in this case, as it had done in numerous similar cases that have come before me and my predecessors, because there was no

specific accident. If the Board followed the case law in this area, many such injured workers would have received the compensation to which I strongly feel they are entitled.

As a matter of basic principle, the Board cannot conduct itself as though it were above the law. Judges and administrative tribunals must have regard for established legal principles and the statutory and common law rules that govern their process. Although the Board must have regard for the "real merits and justice" of the cases before it, that does not mean disregard for the rule of law.

During the Select Committee hearings last fall, I met with the Board's representatives on the issue of legal advice. I was assured that my suggestion concerning more legal input would be considered by the Corporate Board, but to date I have heard nothing from the Board. It is my sincere hope that, when the new Corporate Board and the Workers' Compensation Appeal Tribunal are appointed on July 1, 1985, they will make it a matter of policy to obtain legal advice in appropriate cases. I also believe that it is imperative for these bodies to retain legal counsel to provide advice on procedures at their formative stages.

Again this year, many of the complaints against the Workers' Compensation Board involve a conflict over medical evidence. The treating physicians are of one view and the Board's physicians hold a conflicting view. In the cases that come before me, more often than not the Board accepted the opinion of its physicians regardless of whether the worker's doctors are specialists or recognized experts in the relevant field of medicine.

Because precedence is given to the opinions of Board medical staff, the doctors have been placed in the role of decision-makers. Clearly, it is the responsibility of Adjudicators and Commissioners to weigh and evaluate all the evidence before them without giving preference to the opinions of Board doctors. It is then the responsibility of Adjudicators and Commissioners to provide to the injured worker clear reasons for their preference for one medical opinion over another. These reasons may include the qualifications of the doctors, and the accuracy and thoroughness of medical reports. I would urge the Board to take steps to ensure that the appropriate reasons are given in all cases.

Workers' dissatisfaction with the assessments of permanent disability awards

continues to account for a significant portion of our cases. My predecessor, the Honourable Donald R. Morand, issued a report and made recommendations in 135 cases on the interpretation of section 43 of the Workers' Compensation Act. I am in complete agreement with Mr. Morand that the Board has improperly limited its authority when assessing pensions by only considering the worker's medical condition. Although the Select Committee in its Eighth Report agreed with our position and supported a recommendation to change the Board's procedure, the Legislature did not agree. The Committee then recommended in its Ninth Report that the determination of the proper interpretation of section 43 be referred to the Supreme Court of Ontario.

Decisions made by the Workers' Compensation Board can have serious consequences to the over 400,000 workers injured in this province every year. By implementing my suggestions, the Board will ensure that workers are being treated in accordance with the principles of natural justice.

As a new Ombudsman, I share my predecessor's concern about this issue. I would ask the Select Committee to again consider the Board's policy in this area, and reaffirm the recommendation made by the Committee in its Ninth Report.

SUPREME COURT OF CANADA, BRITISH COLUMBIA OMBUDSMAN

In my previous Annual Report, I discussed the intervention of this Office, as well as the Ombudsman Offices in Saskatchewan and Quebec, in an appeal by the British Columbia Ombudsman before the Supreme Court of Canada, involving a challenge to the Ombudsman's jurisdiction by the British Columbia Development Corporation.

At issue was the meaning to be given to the term "a matter of administration". This Office took the position that a decision of the British Columbia Development Corporation to refuse to renew a tenant's lease was a matter of administration, or in the terms of the Ontario Ombudsman Act, "a decision made in the course of the administration" of the British Columbia Development Corporation.

In addition, the issue of whether the tenant was aggrieved, or in the Ontario Ombudsman Act terms, "affected in its personal capacity" was

argued, and whether the term "person" used in both the British Columbia Ombudsman Act and in the Ontario Ombudsman Act excludes a corporation. Our counsel argued that the tenant of the British Columbia Development Corporation was aggrieved and that a person does include an incorporated body.

I am pleased to report that on November 22, 1984, the Supreme Court rendered a unanimous decision in favour of the British Columbia Ombudsman. All the provincial Ombudsmen were vitally concerned with the outcome of this important case, and the Court's decision vindicated our efforts to protect the effectiveness of the Ombudsman institution throughout Canada.

JURISDICTIONAL CHALLENGE

I must report that the Office of the Ombudsman is again involved in litigation with a governmental organization over the issue of jurisdiction. We had hoped that previous court cases (e.g., The Ontario Ombudsman and the Health Disciplines Board of Ontario) had resolved such issues. However, the Ontario Labour Relations Board has challenged the Ombudsman's authority to consider the merits of Board decisions.

All efforts to resolve this matter informally have failed, so we have instructed counsel, John Sopinka, Q.C., to bring an application under section 15(5) of the Ombudsman Act before the Divisional Court to obtain a declaration on my investigative jurisdiction over the Ontario Labour Relations Board.

We consider this to be a major challenge to the effectiveness of the Ombudsman and hope it will be quickly resolved. An update will be provided in my next report.

SPECIAL REPORTS

In other years, the Ombudsman has included in his Annual Report cases where a government agency had declined to implement the Ombudsman's recommendation. In 1984, in one instance I did not wait for the publication of this Annual Report and I issued a special report in the case of Mr. N. The report was submitted to the Select Committee in August of 1984.

My decision to issue this special report was based on the serious nature of the complaint and my wish to resolve the complaint as quickly as possible. This action did indeed result in the expeditious resolution of the complaint, thereby serving the best interests of the complainant and the government agency involved.

In the coming year it is my intention to issue other special reports as the need arises.

INTERNATIONAL OMBUDSMAN CONFERENCE

In June of 1984 I attended the International Ombudsman Conference in Sweden. As a newcomer to the Ombudsman community, this conference provided me with a unique opportunity to learn from the experience of other jurisdictions and confirm my belief that Ontario has an Ombudsman's Office that is well respected by its peers.

I was delighted to see that Ontario's Select Committee on the Ombudsman was able to send five representatives to the important gathering in Sweden and I urge the Committee to continue its participation in further meetings.

I look forward to furthering my excellent working relationship with the other provincial Ombudsmen at the Canadian Conference of Legislative Ombudsmen to be held in Quebec City in June of 1985.

CASE SUMMARIES

The Ombudsman believes that the right to notice and the right to make representations are principles of natural justice which should be liberally upheld by government authorities. In the following case, the interests of a third party were adversely affected because of failure to do so.

Case Summary 1

This complaint by a trucking company was against the Ministry of Transportation and Communications and the Highway Transport Board. The complainant offered to buy the operating licences of another trucking company which was bankrupt. The Minister, rather than initiating a transfer hearing before the Highway Transport Board, reviewed the bankrupt's licences and exercised his discretion to suspend the operating licences. In that circumstance, our complainant was not entitled to receive notice, nor was he given a right to request a hearing. The bankrupt company and the trustee in bankruptcy received such notice. The complainant and its solicitor made repeated inquiries of the Ministry regarding the status of the transfer application, but received no notice of the hearing. The trustee omitted to request a hearing in time so the Minister cancelled the licences.

The complainant believed that it should have been afforded a hearing because the Ministry was aware of the complainant's economic interest in the licences. Negotiations had begun between the complainant and the trustee for the purchase of the licences, and documents had been filed with the Ministry alerting the Ministry to the negotiations.

We began an investigation that focused primarily on the Ministry as the major decision-maker.

The Ministry indicated that when a transfer application is made to the Highway Transport Board, the Minister has no input in that decision until the Board makes a recommendation to the Minister. By contrast, when the Minister initiates a proposal to cancel or suspend a licence, he is required to notify the licence holder only. The licence holder is given an opportunity for a hearing, but if no hearing is requested, the Minister can then proceed to exercise his

discretion to cancel or suspend the licences. The Ministry was also concerned that public notice of a licence review by the Minister might breach the Minister's obligation of confidentiality. Licence holders are required to file certain confidential financial information with the Ministry.

The Ombudsman concluded on the particular facts of this case that the actions of the Minister were unreasonable and unjust to the complainant. It was unfair to the complainant that the licences were suspended without affording the company an opportunity to make representations.

The Ombudsman recommended that the Minister reinstate the licences of the bankrupt company and give notice to the complainant that a review of these licences was proposed. This would afford the complainant an opportunity to request a hearing and make representations. The Ombudsman also recommended that in future, when the Minister proposed to suspend or cancel an operating licence, he should give notice to any party of whom he is aware who has an economic interest in public transport licences.

The Minister agreed to give effect to the first recommendation and issue a new notice of his proposal to cancel the licences. This then afforded the complainant a chance to request a hearing. A subsequent change to the existing legislation made the acceptance of the second recommendation unnecessary.

The right to privacy and the issue of government handling of confidential information are of great concern to many citizens. The following case illustrates the Ombudsman's role in effecting changes in government policy to ensure the privacy of the individual.

Case Summary 2

The issue in this complaint concerned the confidentiality of a tenant's medical information as it related to eligibility for housing in Ontario Housing accommodations. The tenant complained to the Ombudsman that a Housing Authority employee had violated an oath of secrecy by improperly releasing medical information concerning him to the manager of the building in which he resided, and through this person, to other tenants of the building.

Because the Housing Authority was following established procedures in referring the complainant's file, including medical information, to the housing manager, the Ombudsman did not support the complainant's contention that an oath of secrecy had been broken.

However, it appeared to the Ombudsman that while confidential medical information is sometimes necessary for a specific purpose, such as establishing an applicant's eligibility for housing, there is no reason to retain this information on file once this purpose has been satisfied.

Following a meeting with the Ombudsman to discuss the matter, the Chairman of the Ontario Housing Corporation referred the matter to the Board of Directors of the Ontario Housing Corporation and to the Advisory Council of Housing Authority Chairmen.

As a result of their review, the Ontario Housing Corporation circulated a revised policy statement relating to confidential medical information. Under the revised policy, in those situations where confidential medical information is required to establish eligibility, the documents will be destroyed after review, and the applicant will be so advised. Should the applicant prefer to have the information retained on file in the event of an emergency, the applicant must sign a release indicating consent.

The effect of this new policy is that medical information will no longer be transferred to housing managers once an applicant is accepted for housing, thus assuring the tenant's privacy.

Sometimes our complainants' affairs have been needlessly complicated because of the differing requirements of government agencies. In this case, our Office was able to hasten a family's access to a new home by helping to coordinate the actions of local welfare officials and the Housing Authority.

Case Summary 3

A northern Ontario couple with four children had been living for some time in one room above a restaurant, with no refrigerator or stove, and a shared bathroom in the hall. Although they had been on the waiting list for assisted

housing since 1982, they have not yet been provided with accommodation.

In November, 1984, our investigator met personally with an official from the Housing Authority and was informed that the couple was near the top of the waiting list. Soon after, the complainants were informed that a four-bedroom house had become available for them. The couple signed a lease to start January 1, 1985, but they then discovered that under Housing Authority policy they could not move in without their own refrigerator and stove. The couple did not have enough money to buy these appliances. They applied for special welfare assistance to purchase them.

Our investigator found that the refrigerator and stove which had originally been in the house were in storage. The Housing Authority was unwilling to put them back in the house. In any case, the stove was propane and the house had been converted to take only an electric stove. The Housing Authority was unwilling to provide other appliances, and would not allow the family to move in without them.

Then the couple's present landlord asked them to vacate the room above the restaurant by December 14, 1984. The couple's application for special welfare assistance to buy the appliances had not yet been approved, although it appeared that it would be shortly.

Our Office again contacted the Housing Authority to discuss the problem, and also contacted officials of the Ontario Housing Corporation in Toronto and in the northern Ontario region. On December 12, 1984 our investigator was informed by the Housing Authority that as soon as the welfare application had been approved, the Housing Authority would allow the complainants to occupy the house and would lend them appliances for their use during the three weeks required for delivery of new appliances. The application was approved the same day, and the complainants were able to move into their new house without delay.

The Ombudsman strives to ensure that Ministry officials abide by the principles of natural justice. In the following example, the Ombudsman asserted the right of a citizen to be heard before authorities make a decision which is against his interest.

Case Summary 4

(Case Summaries continued on page 21)

This complainant believed he had been treated unfairly by the Ministry of Transportation and Communications. He was president of a private vocational transport training centre, which in April 1983 had been granted recognized authority under the Ontario Driver Certification program to train and license its own students. However, on September 29, 1983, he received a letter from the Ministry notifying him that his authority was cancelled effective September 26, 1983, on the grounds that the Centre's training program did not encompass the required number of hours.

The Ministry had been acting in response to recommendations of the report of the Ontario Commission on Truck Safety, issued in April 1983. Included was a recommendation, accepted by the government as policy in September 1983, against extending the Ontario Driver Certification program to private vocational schools until a review of the curricula in other jurisdictions had been completed and course upgrading recommendations had been reviewed. During an August 1983 inspection of the Centre, the Ministry had noted that the curriculum for one training course fell short of the required hours, and that in the other course, half the required performance objectives had been deleted, and the required hours of training had not been met.

In March 1983, the complainant had signed an acknowledgement outlining the conditions under which the Centre should operate, and had acknowledged that the Ministry could revoke the Centre's authority if these conditions were not met. Thus the Ministry could revoke the Centre's authority.

However, the Ombudsman noted that the Ministry had given the complainant no prior warning or notice that the training programs were inadequate, nor was he given an opportunity to amend the courses to comply with the performance objectives.

In October 1984, the Ombudsman notified the Ministry of his possible conclusion that the Ministry unreasonably omitted to advise the complainant of its intent to revoke the recognized authority, and unreasonably omitted to give him an opportunity to respond. He further stated that he might possibly recommend that the Ministry reinstate the recognized authority conditional upon curricula which met the required performance objectives.

Statistical Information

COMPLAINTS & INFORMATION REQUESTS BY ORGANIZATION FISCAL YEAR 1984-85

ORGANIZATION COMPLAINED AGAINST	WITHIN JURIS- DICTION	OUTSIDE JURIS- DICTION	INFORMA- TION REQUESTS	TOTAL
AGRICULTURE & FOOD	<u>16</u>	<u>16</u>	<u>8</u>	<u>40</u>
ATTORNEY GENERAL	22	50	44	116
ONTARIO MUNICIPAL BOARD	41	10	15	66
PUBLIC TRUSTEE	17	5	12	34
TOTAL ATTORNEY GENERAL	<u>80</u>	<u>65</u>	<u>71</u>	<u>216</u>
COLLEGES & UNIVERSITIES	<u>55</u>	<u>27</u>	<u>35</u>	<u>117</u>
COMMUNITY & SOCIAL SERVICES	113	90	72	275
SOCIAL ASSISTANCE REVIEW BOARD	61	13	9	83
TOTAL COM. & SOC. SERVICES	<u>174</u>	<u>103</u>	<u>81</u>	<u>358</u>
CONSUMER & COMMERCIAL RELATIONS	<u>104</u>	<u>34</u>	<u>90</u>	<u>228</u>
CORRECTIONAL SERVICES	91	17	27	135
CORRECTIONAL CENTRES	811	74	158	1043
DETENTION CENTRES	1504	90	258	1852
JAILS	1149	56	105	1310
TOTAL CORRECTIONAL SERVICES	<u>3555</u>	<u>237</u>	<u>548</u>	<u>4340</u>
CITIZENSHIP & CULTURE	<u>3</u>	<u>2</u>	<u>5</u>	<u>10</u>
EDUCATION	<u>27</u>	<u>7</u>	<u>8</u>	<u>42</u>
ENERGY		1		1
ONTARIO HYDRO	36	11	20	67
TOTAL ENERGY	<u>36</u>	<u>12</u>	<u>20</u>	<u>68</u>
ENVIRONMENT	<u>39</u>	<u>2</u>	<u>11</u>	<u>52</u>
GOVERNMENT SERVICES	<u>19</u>	<u>8</u>	<u>7</u>	<u>34</u>
HEALTH	90	15	33	138
PSYCHIATRIC HOSPITALS	114	18	16	148
O.H.I.P.	24	11	30	65
TOTAL HEALTH	<u>228</u>	<u>44</u>	<u>79</u>	<u>351</u>
INDUSTRY & TRADE DEVELOPMENT	<u>2</u>		<u>3</u>	<u>5</u>
INTERGOVERNMENTAL AFFAIRS		1		1
LABOUR	60	20	32	112
HUMAN RIGHTS COMMISSION	29	8	25	62
WORKERS' COMPENSATION BOARD	565	382	463	1410
TOTAL LABOUR	<u>654</u>	<u>410</u>	<u>520</u>	<u>1584</u>
MUNICIPAL AFFAIRS & HOUSING	89	11	46	146
ONTARIO HOUSING CORPORATION	18	20	30	68
TOTAL MUNICIPAL AFFAIRS & HOUSING	<u>107</u>	<u>31</u>	<u>76</u>	<u>214</u>
NATURAL RESOURCES	<u>73</u>	<u>12</u>	<u>27</u>	<u>112</u>
NORTHERN AFFAIRS	<u>3</u>	<u>5</u>	<u>2</u>	<u>10</u>
REVENUE	<u>35</u>	<u>15</u>	<u>15</u>	<u>65</u>
SOLICITOR GENERAL	<u>40</u>	<u>39</u>	<u>38</u>	<u>117</u>
TOURISM & RECREATION	<u>10</u>	<u>3</u>	<u>3</u>	<u>16</u>
TRANSPORTATION & COMMUNICATIONS	<u>86</u>	<u>54</u>	<u>50</u>	<u>190</u>
TREASURY & ECONOMICS	<u>4</u>	<u>1</u>	<u>1</u>	<u>6</u>
ONTARIO GOVERNMENT OTHER	<u>16</u>	<u>48</u>	<u>426</u>	<u>490</u>
ONTARIO GOVERNMENT TOTAL	<u>5366</u>	<u>1176</u>	<u>2124</u>	<u>8666</u>
COURTS		352	40	392
FEDERAL		627	183	810
PRIVATE		2119	503	2622
MUNICIPAL		695	85	780
INTERNATIONAL		11	6	17
OTHER PROVINCES		40	29	69
NO ORGANIZATION SPECIFIED		28	74	102
TOTAL	<u>5366</u>	<u>5048</u>	<u>3044</u>	<u>13458</u>

Statistical Information

DISPOSITION OF JURISDICTIONAL

ORGANIZATION COMPLAINED AGAINST	COMPLAINT SUPPORTED			INDEPENDENTLY RESOLVED	UNSUBSTANTIATED	IN ABANDON
	NO RECOMMENDATION	FORMAL RECOMMENDATION ACCEPTED	DENIED			
AGRICULTURE & FOOD	0	0	0	0	10	1
ATTORNEY GENERAL				1	2	5
<i>Ontario Municipal Board</i>				0	14	1
<i>Public Trustees</i>				1	1	1
TOTAL ATTORNEY GENERAL	0	0	0	2	17	7
COLLEGES & UNIVERSITIES	3	0	0	1	14	2
COMMUNITY & SOCIAL SERVICES		2	3	9	15	6
<i>Social Assistance Review Board</i>		0	3	0	35	1
TOTAL COMMUNITY & SOCIAL SERVICES	0	2	6	9	50	7
CONSUMER & COMMERCIAL RELATIONS	2	0	9	1	24	7
CORRECTIONAL SERVICES	1	2	20	3	4	16
<i>Correctional Centres</i>	1	1	0	83	10	244
<i>Detention Centres</i>	0	0	0	113	13	575
<i>Jails</i>	0	0	1	87	28	810
TOTAL CORRECTIONAL SERVICES	2	3	21	286	55	1305
CITIZENSHIP & CULTURE	1	0	0	0	0	0
EDUCATION	0	0	0	1	8	1
ENERGY						
<i>Ontario Hydro</i>					6	6
TOTAL ENERGY	0	0	0	0	6	6
ENVIRONMENT	0	0	0	1	11	4
GOVERNMENT SERVICES	0	0	0	0	6	0
HEALTH	4	0	0	1	29	3
<i>Psychiatric Hospitals</i>	1	0	0	8	2	14
<i>O.H.I.P.</i>	0	0	1	2	2	
TOTAL HEALTH	5	0	1	11	33	26
INDUSTRY & TRADE DEVELOPMENT	0	0	0	0	0	0
INTERGOVERNMENTAL AFFAIRS	0	0	0	0	0	0
LABOUR	0	0	0	0	22	4
<i>Human Rights Commission</i>	0	0	0	0	35	3
<i>Workers' Compensation Board</i>	5	9	21	13	277	12
TOTAL LABOUR	5	9	21	13	314	21
MUNICIPAL AFFAIRS & HOUSING	0	4	0	3	11	7
<i>Ontario Housing Corporation</i>	0	0	0	0	2	2
TOTAL MUNICIPAL AFFAIRS & HOUSING	0	4	0	3	13	10
NATURAL RESOURCES	0	0	0	1	28	5
NORTHERN AFFAIRS	0	0	0	0	0	0
REVENUE	0	1	0	2	4	3
SOLICITOR GENERAL	0	0	0	2	4	1
TOURISM & RECREATION	0	0	0	0	1	1
TRANSPORTATION & COMMUNICATIONS	0	1	0	1	27	6
TREASURY & ECONOMICS	0	0	0	0	1	0
ONTARIO GOVERNMENT OTHER	2	0	0	0	5	2
ONTARIO GOVERNMENT TOTAL	20	20	58	334	631	1415

COMPLAINTS FOR FISCAL YEAR 1984-85

DISCONTINUED AWN SECTION 18	COMPLAINANT ASSISTED	TOTAL
2	0	16
5	3	22
17	1	22
25	6	80
12	9	55
12	2	113
21	31	174
12	13	104
9	5	91
177	1	22
316	1	22
18	1	22
560	237	3555
1	0	3
7	3	27
	0	0
4	12	36
10	5	39
2	2	19
36	3	90
48	21	228
0	0	3
0	0	0
16	5	60
134	43	654
14	20	89
17	24	107
16	4	73
2	0	3
11	4	35
20	2	40
4	1	9
11	14	86
1	1	4
4	0	16
924	432	5366

GLOSSARY

COMPLAINT SUPPORTED

NO RECOMMENDATION - At times the Ombudsman will support a complaint but decide no recommendation is appropriate given all the circumstances.

FORMAL RECOMMENDATION ACCEPTED - Those complaints where the governmental organization agrees to implement the Ombudsman's recommendation.

FORMAL RECOMMENDATION DENIED - Those complaints where the governmental organization refuses to implement the Ombudsman's recommendation. The discrepancy between the total number (58) and the fact that only 19 case summaries are presented in our Volume II is explained as follows: many cases are resolved between the end of our fiscal year (when our statistics are compiled) and the publication date of our report.

INDEPENDENTLY RESOLVED - Many complaints are resolved independent of the Ombudsman's involvement. This can occur at any point in the investigative process prior to the Ombudsman issuing a final report.

UNSUBSTANTIATED - Those complaints where the Ombudsman's investigation reveals no grounds to support the complainant's contention.

INVESTIGATION DISCONTINUED - The Ombudsman uses his discretion to discontinue an investigation at any point prior to issuing a final report for a number of reasons:

ABANDONED - Attempts to communicate with the complainant are unsuccessful (eg., complaints from inmates of correctional facilities who are released in the course of our investigation and leave no forwarding address.)

WITHDRAWN - At the request of the complainant. In many cases information is provided to the complainant and, although there is no resolution the complainant does not wish us to pursue the matter.

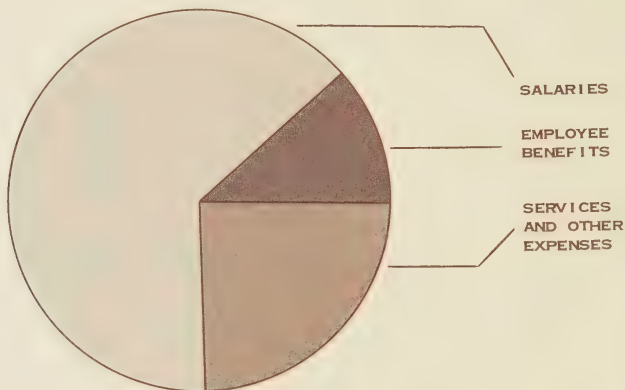
SECTION 18 - Refers to Section 18 of the Ombudsman Act which allows the Ombudsman the discretion to discontinue the investigation if, for example, there is an adequate alternative remedy or the complaint is frivolous or having regard to all the circumstances no further investigation is necessary.

COMPLAINT ASSISTED - Those complaints where the Ombudsman renders assistance and usually involve tangible corrective action taken by the governmental organization.

Statistical Information

DISPOSITION OF NON-JURISDICTIONAL COMPLAINTS, INFORMATION REQUESTS/SUBMISSIONS

Organization	Information Provided	Inquiries Made	No Action Possible	Total	Percent
Provincial	2744	436	120	3300	40.7
Federal	706	90	14	810	10.0
Municipal	689	78	13	780	9.6
Private	2498	86	38	2622	32.4
Courts	369	11	12	392	4.8
Other Provinces	65	4	0	69	1.0
No Organization Specified	82	2	18	102	1.3
International	16	1	0	17	.2
TOTAL	7169	708	215	8092	100.0



ACTUAL EXPENDITURES FOR THE FISCAL YEAR 1984-85

Salaries	\$3,716,100		
Employee Benefits	666,600	Furniture & Office Equipment	62,500
Travel & Relocation	171,200	Office Supplies & Devices	63,200
Telephone, Mailing & Delivery	180,500	Books & Publications	66,400
Building Rent	495,600	Other Supplies & Equipment	60,100
Equipment & Other Rental	180,600	Transfer Payment To The International Ombudsman Institute	3,000
Professional Services	91,700		
Other Services	117,500		
TOTAL	\$5,875,000		

However, at a meeting held to discuss the matter, the Ministry stood by its actions, stating that the situation had required urgent action, and it therefore had no choice but to cancel the Centre's certification powers. Ministry officials stated further that it was now governmental policy not to permit private enterprise to certify truck driving students.

In his report, the Ombudsman stated that the rules of procedural fairness require notice and an opportunity to be heard before a decision is rendered. While he recognized that the courses may have fallen short of the performance objectives, and that this may have constituted a breach of the agreement between the complainant and the Ministry, this breach should not operate to deprive the complainant of fair treatment. In the Ombudsman's view fair treatment would have included an opportunity for the complainant to know and respond to the Ministry's criticism of the courses before the decision was made to revoke the recognized authority.

During the course of our investigation the school was closed for reasons other than the decision to revoke its recognized authority. The Ombudsman therefore could not recommend in his final report that the recognized authority be reinstated.

The Ombudsman will support a complaint when government authorities do not comply with legislation. In the following example, the Housing Authority failed to comply with a provision in the Residential Tenancies Act requiring 90 days' notice of rental increases.

Case Summary 5

This couple, both senior citizens, were informed in September 1983 that the rent for their Housing Authority accommodation would be increased on December 1, 1983 from \$214 to \$251 per month. They were of the view that this was an unreasonable increase for the size of their unit and, for this reason and other health reasons, applied for a transfer. When the transfer was denied in November 1983 they did not appeal, but instead found other accommodation as of February 1, 1984 in the private sector.

They did not pay the increased rental during December and January, but rather paid

(Case Summaries continued from page 16)

the old rent of \$212. When the Housing Authority requested payment of \$78 in rent arrears for the two months, the couple contacted the Ombudsman.

In response to the Ombudsman's notice of his intention to investigate the matter, the Housing Authority stated that as the complainants had not received the full 90 days' notice of the rent increase, the increase for December would be waived, leaving a balance of \$39 owing for January.

In March 1984 the couple received an invoice from the Housing Authority in the amount of \$44 covering maintenance work in the apartment, required after the complainants had vacated it. The complainants agreed with only \$2 of these charges, and sent the Housing Authority a money order for that amount. The total amount owing, according to the Housing Authority, was then \$81. The Housing Authority then referred the matter to a collection agency, which thereupon contacted the complainants on several occasions.

The original notice of rent increase, which fell short of the required 90 days, had never been reissued to the complainants. Our legal research indicated that the complainants had therefore not received the required 90 days' notice for the January increase as required by the Residential Tenancies Act. The area Housing Authority's General Manager agreed to discuss this with his legal counsel, and subsequently informed our Office that the January rent increase would be waived on this basis.

When the complainants were informed of this, they stated that they would be willing to pay \$39 to the Housing Authority if it agreed to cease pursuing the matter. This proposal was acceptable to the Housing Authority, and the complaint was resolved.

The Ombudsman uses his knowledge of the law to help citizens and government officials alike live up to the spirit of provincial legislation. In this case, the Ombudsman pointed out to the Ministry of Revenue a section of the Retail Sales Tax Act that enabled the complainant to enjoy a retail sales tax rebate that he deserved, despite the fact that he was unable to meet all the requirements of a special rebate program.

Case Summary 6

This complainant decided to purchase a new 1981 car under an incentive program established by the government to stimulate sales in the automobile industry. Under the program, a purchaser would qualify for a retail sales tax rebate if he signed an agreement to purchase a new 1981 car by November 28, 1981, and took delivery of the car between November 6, 1981 and December 5, 1981.

On Saturday, November 28, 1981 the complainant signed an agreement to purchase a car, paying \$672 in retail sales tax. He arranged to take delivery of the car on Monday, November 30, 1981. However, on Sunday, November 29, 1981, the man suffered a heart attack and was hospitalized until December 14, 1981. It was not until December 24, 1981 that he was able to take delivery of the car and pay the balance of the purchase price. His application for a rebate, which showed the delivery date to be December 24, was dated the same day, and was sent to the Ministry of Revenue along with a note from the complainant's doctor and a letter explaining that delivery had originally been arranged for November 30. The Ministry denied the rebate because the complainant had not taken delivery within the time period specified in the regulation.

In May, 1984 the Ombudsman wrote the Ministry of Revenue advising that he was considering a possible recommendation that the Ministry grant the complainant the rebate. He stated that this complainant had purchased the new 1981 car because of the incentive offered through the rebate program, and it was only due to the special circumstances caused by his heart attack that he was unable to take delivery of the car by the required time. All other criteria had been met. The Ombudsman pointed out that under section 7(1) of the Retail Sales Tax Act, the Minister of Revenue, with the approval of the Lieutenant Governor-in-Council (Cabinet), may exempt a purchaser from payment of the whole or any part of retail sales tax, if owing to special circumstances it is deemed inequitable that the whole amount of the tax be paid.

After reconsidering the matter, the Ministry agreed that the complainant was entitled to the rebate. An order-in-council was passed, giving the Ministry authority to grant the rebate. In September, 1984 our Office was informed that the cheque had been processed and would be forwarded to the complainant.

Often Ministry officials will readily acknowledge responsibility for an error, but may believe that they do not have the statutory authority to compensate even a minor financial loss to the complainant. The following example illustrates the Ombudsman's ability to intercede and assist the two parties in rectifying the matter.

Case Summary 7

On July 22, 1982, the Ombudsman issued a final report in which he concluded that the Ministry of Revenue had been wrong in almost doubling the complainant's 1980 property assessment. In order to straighten out this situation, the complainant had incurred out-of-pocket expenses of \$30.35 and the Ombudsman recommended that the Ministry take appropriate steps to reimburse him. In response, the Deputy Minister expressed regret at the error, but stated that a thorough review of the Assessment Act and the Ministry of Revenue Act revealed no statutory authority under which the payment might be made. He stated, nevertheless, that the Ministry remained receptive to any proposal that would permit it to reimburse the complainant. Our Office subsequently suggested to the Ministry that it could possibly pay the complainant on the basis that his complaint could have been the subject of litigation against the Ministry. In November, 1982, the Ministry requested a legal opinion from the Ministry of the Attorney General, and in November, 1984, the Deputy Minister of Revenue advised that an opinion had been received indicating that the complainant's claim could be settled. The Ministry offered the complainant \$30.35 plus interest at 12% from the date of the original letter advising the Ministry of the Ombudsman's intention to investigate the complaint.

In February, 1985, the Ministry sent our Office a cheque for \$43.27 which was delivered to the complainant.

The following example demonstrates how the Ombudsman will support a complainant who relies, to his detriment, on wrong information inadvertently given by a Ministry official.

Case Summary 8

The complainant held a \$100,000 second mortgage on an inn in Eastern Ontario. When the mortgagors defaulted on their payments, he repossessed the establishment as mortgagee in possession under the terms of the mortgage. For several months, however, the mortgagors had not remitted retail sales tax collected on sales to consumers, and a Ministry of Revenue audit showed \$9,219.27 owing. The complainant alleged that the Ministry's auditor had informed him that the liquor licence to continue operating the inn would not be issued unless the amount was paid. The mortgagors could not pay, so the complainant undertook to do so on their behalf in exchange for a \$5,000 interest-free promissory note due in five years. The complainant felt that the Ministry had not acted vigorously enough in collecting tax from the mortgagors and had misled him to believe that if he did not pay their liability, no liquor licence would be issued and the inn's business would be jeopardized. Our investigation confirmed that the Ministry instituted no collection proceedings against the mortgagors, that the liquor licence which was ultimately issued by the LLBO was not conditional upon payment of any tax, although the Ministry's auditor believed that to be the case, and that the complainant had no legal obligation to pay the tax.

In response to the Ombudsman's letter stating that he might support the complaint, the Ministry maintained that it should not have to compensate the complainant for his decision to assume the mortgagors' tax liability, and it denied that the auditor misled the complainant. In response to the Ombudsman's final report supporting the complainant, the Deputy Minister acknowledged that the complainant believed that the liquor licence would not be issued unless he paid the tax, and that he was therefore under considerable pressure to do so. The Deputy Minister informed the Ombudsman that he would direct his staff to process a refund of \$4,219.27 to the complainant, being the total amount paid less the \$5,000 which the complainant had previously recovered on the basis of the promissory note.

It is often difficult to establish clear facts about environmental problems. For this reason, environmental questions are often vital to those who want complete answers about their situations. In this case, our Office was not able to reach a firm conclusion about the cause of the

death of a five-year-old boy. We were at least able to reassure his mother that it was impossible to assign definite responsibility.

Case Summary 9

The complainant was convinced that the death of her five-year-old son from Reye's Syndrome was caused by the September 1975 spraying of Baygon Pesticide in the area of southern Ontario near her home.

In 1982, she contacted the Ministry of Health and the Ombudsman to protest the approval and financing of the spraying by the Ministry. Our Office's extensive investigation of the matter included interviews with Ministry officials, independent sources, and medical staff who had been involved with the preparation, management and follow-up to the spraying program. We studied numerous primary and secondary sources, as well as medical, scientific and technical journals.

The spraying had been done to combat an outbreak of St. Louis Encephalitis in the area. The first case was reported in July 1975. Within a few months, 66 cases had been confirmed. Five of the fifty cases in the area were fatal.

After it was established that the epidemic was carried by mosquitos, the Medical Officer of Health — working in consultation with the Mayor, advisors from the Health and Environment Ministries, and Guelph University experts — decided to spray 100,000 acres in the area.

Before the spraying a hotline was set up to handle public inquiries, and efforts were made to inform the public about the need for the spraying. Persons with respiratory diseases and problems were advised to stay indoors. The complainant and her son were in their yard on the afternoon of the spraying, and pesticide droplets touched both of them. Her son fell ill a month later, and died of Reye's Syndrome within a week.

Our research showed that after the spraying, no further human cases of St. Louis Encephalitis were reported in the area. Known environmental or human problems which could be traced to the spraying were apparently non-existent or very limited.

There have been extensive studies on the possible causes of Reye's Syndrome, a disease which almost exclusively attacks children.

To date, the cause or causes of Reye's Syndrome have not been conclusively identified, although several, including pesticides, are suspected. Several studies point to pesticides and insecticides as a possible cause. Many studies note that children in rural areas where insecticides are commonly used are more susceptible than children in areas where insecticides are less frequently used. But other studies do not find this relationship.

The complainant studied the results of our research and thanked our Office for our thorough review of current information on Reye's Syndrome.

For citizens who are unable to work because of prolonged illness or disability, even relatively small sums of money can be vitally important. This case illustrates how the Ombudsman can help recipients of Family Benefits to secure sums that have been delayed because of review processes or other complications.

Case Summary 10

In this case, the father of a Family Benefits recipient purchased a \$1,500 Guaranteed Investment Certificate in April 1980. He used \$1,000 of his own money and \$500 of his son's. The GIC was registered in the son's name to reduce the father's taxes.

The certificate increased the son's assets to an amount above the maximum allowed to Family Benefits recipients at that time. The Ministry of Community and Social Services cancelled the son's Family Benefits in September 1980 and requested the return of an overpayment of \$469.11 for the months April to September 1980.

To rectify this situation, the GIC was transferred to the father's name on September 15, 1980. The Director of Family Benefits, however, decided that the transfer had been made for an "inadequate consideration", and that the son was still ineligible for Family Benefits.

In January 1981, the father appealed both the cancellation of Family Benefits eligibility and the request for repayment of benefits to the Social Assistance Review Board. He argued that most of the money used for the purchase was his own.

The Board at first upheld both Ministry actions, but in August 1982 agreed to grant benefits for the months of October, November, and December 1980. The Board acknowledged that most of the GIC money was the father's, and agreed that the transfer of the certificate to the father was not for an insufficient reason. Because the GIC had been registered in the son's name from April to September 1980, however, the Board still upheld the decision to require the return of an overpayment.

The father contacted the Ombudsman's Office in November 1983 because the son had never received payment for the months of October, November and December 1980. He also complained that it was unreasonable to deny his son benefits for the month of September 1980, although he now agreed that an overpayment had been made from April to August 1980.

The Ombudsman did not support the complainant's argument that benefits should be paid for September 1980, because the GIC was transferred on September 16, 1980. According to Family Benefits legislation, the son became eligible to receive his allowance on the first day of the following month.

Discussion between representatives of our Office and the Ministry reaffirmed that benefits should be paid for the months of October, November and December 1980. This sum was subsequently paid to the complainant's son.

The Ombudsman believes that citizens are entitled to government decisions based on all relevant information, and only on relevant information. In this case, the omission of pertinent data from consideration of the complainant's case had resulted in the denial of government benefits that he badly needed.

Case Summary 11

The complainant was a recipient of General Welfare Assistance who had applied for Family Benefits on the grounds that he was permanently unemployable. He approached our Office with the claim that in November 1983, the Social Assistance Review Board had unreasonably upheld a decision to deny him Family Benefits. He said that the Review Board had refused to consider medical evidence which he attempted to submit at the hearing.

Our review of the complainant's file at the Ministry turned up information substantiating his assertion that he was permanently unemployable. Further investigation showed that the Director's submission to the Review Board had not included all relevant information. It appeared to the Ombudsman that the Board might have reached a different conclusion if it had considered all information.

In November 1984, the Ombudsman and members of his staff met with Ministry officials to discuss the matter. After reviewing the complainant's file, the Ministry agreed that the complainant was disabled, and Family Benefits entitlement was made retroactive to May 1983.

The complainant received a cheque for the difference between the General Welfare Assistance allowance and Family Benefits from May 1983 to November 1984. In December 1984, he started receiving regular Family Benefits.

In some cases, the Ombudsman's investigation provides the complainant the moral and social support he needs to solve his problem, even when we cannot support his claim against the government. In this case, our Office was able to dissuade the complainant from drastic but ineffective action that he hoped would afford him some relief.

Case Summary 12

The complainant was distraught about the financial difficulties he was having with his fast food restaurant. He contended that the Ministry of Transportation and Communications was responsible for his problems. He decided to go on a hunger strike until the Ministry accepted responsibility and compensated him.

The complainant constructed his restaurant in 1977-1978 on land adjoining a northern Ontario highway. Before he started construction, he had contacted the Ministry of Transportation and Communications to inquire about the projected paving of a nearby road. He was given to understand that the nearby road would continue as a gravel access road for forest products, and would not be paved for another ten years. The complainant proceeded on the basis of this information to plan a restaurant catering to seasonal traffic.

By October 1980, the alternate highway had been completely paved. The complainant contacted the Ministry in 1982 and claimed that he had been misled. He asked for compensation based on his contention that his business was suffering because of reduced traffic on the older highway.

When the Ministry declined to accept responsibility, the complainant contacted the Ombudsman, his MPP, and the media. He planned a hunger strike to begin in August 1984.

Members of our staff met with the complainant, his family, and the complainant's MPP in an effort to dissuade him from the hunger strike. Our investigator stressed the health dangers associated with a hunger strike. The complainant postponed his hunger strike to September 1984 and later to October 1984. The MPP wrote a letter thanking us for our assistance, and for the care and attention our Office had given to the complainant.

After an extensive investigation, the Ombudsman issued his report on the case in October 1984. He could find no evidence to substantiate the complainant's contention that the Ministry had deliberately misled him. The employee who had given the information about the road knew only that it was originally intended to be used for forest access. At that time, its paving was being discussed only at the highest levels in the Ministry.

We also found that the restaurant had lost money during the three years before the road was paved. Our review indicated that even the diversion of all traffic from the new road to the old road would only bring the restaurant to the break-even point, assuming that it maintained its market share.

The complainant finally did begin his hunger strike on October 10, 1984. But on October 16, 1984, he told our Office that he had discontinued it because his family had provided him financial assistance to pay his debts. He said that he planned to reopen his restaurant in the spring, and keep in contact with us.

The Ombudsman often helps complainants to achieve a livable solution to their problems, even when he cannot support their claims against the government. In this case, the Ombudsman was able to negotiate an agreement

that eased the financial burden on a pensioner who had to return an overpayment she had received from the Teachers' Superannuation Commission.

Case Summary 13

When the Teachers' Superannuation Commission discovered that, through its own administrative error, it had overpaid a 72-year-old retired teacher the sum of \$4,020.63, it advised the pensioner that she would be required to repay the money either in a lump sum or by twelve monthly payments. When the former teacher advised that she was unable to repay the money, the Fund began deducting the sum of \$50 per month from her pension.

The teacher had retired in June 1974 at age 64, and began receiving her pension in July 1974. The Teachers' Superannuation Act requires that the pension of a retired person must be reduced when the pensioner turns 65 years of age, and begins receiving a Canada Pension Plan pension. The amount of the reduction and the amount of the CPP pension are the same, with the result that the retired person receives exactly the same amount of money, although the money then comes from two different sources. In this case, the Teachers' Superannuation Fund did not make the reduction when the teacher turned 65 in September 1974, and the error was not discovered for eight years.

The debt was a sizable one, and the episode caused the complainant much anguish. Her standard of living was altered, and income tax problems complicated the matter.

The Commission took the view that the debt was a lawful one, which it was obliged to recover, and submitted that to waive the debt would be unfair to the other contributors to the Fund, and to Ontario taxpayers.

The Ombudsman could not support the complainant's contention that the Fund should not recover the overpayment. However, in an effort to relieve the complainant's financial burden, the Ombudsman proposed that the deductions be reduced by 50% to \$25 per month. The Commission agreed to this solution.

The Ombudsman's services are available to the corporate citizen, as well as to individual

aggrieved citizens. In this case, the Ombudsman's investigation helped to ensure fairness in the marketing of drugs. At our suggestion, the Ministry of Health amended its guidelines for the inclusion of products in the comparative drug index formulary.

Case Summary 14

The president of a pharmaceutical company complained to the Ombudsman that the company had been treated unfairly by the Ministry of Health. At issue was the inclusion in the Ministry's July 1982 comparative drug index formulary of a competitor's drug which had not met the Ministry's guidelines for inclusion in the formulary. The competitor's drug had been listed as interchangeable with a drug manufactured by the complainant's company, and was listed as available at a much lower price. As a result, the complainant's company suffered considerable losses in sales of its drug.

The formulary, issued semi-annually, serves as a guide to the identification of quality drugs and comparative products, and is used by practitioners, pharmacists and hospitals. Under the Ministry's guidelines, distributed in October 1980, only drugs available on the market at the time of the submission to the Ministry, that is, drugs with federal government approval, could be considered for listing in the formulary. A Notice of Compliance, issued by the federal government to indicate its approval of the drug for sale in Canada, was to be included with each submission. It was clear from the language used in the guidelines that compliance with the stated requirements was compulsory.

Prior to publication of the July 1982 formulary, the complainant learned of the listing of the competitor's drug. However, he knew the federal Notice of Compliance for this drug had not been received by the manufacturer until January 27, 1982, almost a month after the December 30, 1981 deadline established by the Ministry for submissions of additional products for listing in the formulary. The complainant wrote first to the Ministry, stating his objections, and later to the Ombudsman.

The Ministry advised our Office that its written guidelines were merely administrative guidelines. In this case it had accepted the manufacturer's indication that there would be substantial savings to the public if its drug was listed.

It appeared that those manufacturers which adhered to the written guidelines were at a disadvantage, while manufacturers which disregarded the guidelines could presumably benefit. The Ombudsman wrote the Ministry stating that it might be open to him to recommend either that the guidelines be amended to accurately reflect the Ministry's practice, and that procedures be established for exceptional situations, and for notification to manufacturers negatively affected by these exceptions, or, in the alternative, that the Ministry follow without exception its stated 1980 guidelines to ensure fairness and equality of treatment among manufacturers.

The Ministry reviewed the matter and amended its guidelines. Manufacturers were advised that completed submissions must be received by the Ministry's stated deadline before a drug will be considered for inclusion in the formulary. Exceptions will only be made in those rare situations where a new drug product is considered to be a major therapeutic advancement and is recommended for early listing. In those cases, affected manufacturers will be notified of the planned exception and provided with an opportunity to make written representations to the Ministry on any matters of contention.

Although in his June 1984 report the Ombudsman supported the complainant's contention that his company had been treated unfairly by the Ministry, he made no recommendation in this case. In light of the Ministry's amendments to the guidelines, he considered that the events that had given rise to this complaint would not occur again.

The Ombudsman personally involves himself in the process of resolving the more difficult, complex complaints that come to our Office. In this case he was able to secure an agreement with the Ministry of Correctional Services that the complainant should be paid post-judgment interest on an award made by the Crown Employees Grievance Settlement Board against the Ministry.

The intervention of the Ombudsman has also prompted the government to consider legislative changes that will empower the Grievance Settlement Board and other boards, agencies and commissions to grant post-judgment interest on their awards.

Case Summary 15

The complainant had been employed as a correctional officer at an Ontario Correctional Centre since 1973. In March 1978, the Ministry of Correctional Services introduced a policy concerning correctional officers' facial hair. This policy required all male correctional officers to shave in a manner that made it possible for an air-mask and tear-gas mask to be properly sealed around their faces and jaw lines. This policy was meant to ensure that correctional officers could function effectively in emergency situations.

The complainant was a member of the Sikh religion, which includes as one of its tenets a requirement that men not cut their hair or beards, and, consequently, the complainant refused on religious grounds to adhere to the Ministry's policy on facial hair.

The Ministry offered the complainant several lower-paid alternative positions, which required relocations for which no expenses would be paid. These were rejected by the complainant and in May, 1978, he was demoted to the position of Clerk 2, Supply, at the Correctional Centre.

The complainant took the matter to his union, and his grievance was heard before the Crown Employees Grievance Settlement Board in November 1979. In its November, 1980 award, the Grievance Settlement Board ordered that the complainant should be reinstated to the rank of Correctional Officer 2, effective November 14, 1979. The Board also ordered that the complainant should be paid the difference between his salary and benefits as a Correctional Officer 2 and the salary and benefits that he had been paid in his demoted position as a Clerk 2, Supply.

In January, 1981, the Ministry appealed to the Divisional Court for a judicial review of the award. After this application was dismissed, the Ministry obtained leave to appeal to the Court of Appeal. However, the appeal was dismissed by the Court of Appeal in April 1982.

In May 1982, the Ministry sent the complainant's union a cheque for \$10,067, which was the net amount of the difference between his salary as a Correctional Officer and his salary as a Clerk 2, Supply. The union then asked the Ministry to pay post-judgment interest on this sum of money from the November 1980 date of the award until the date the cheque was sent to the union, some one-and-a-half years later. When the Ministry denied this request, the union asked the Grievance Settlement Board to

reconvene to consider the question of post-judgment interest on the back pay awarded to the complainant.

The Board issued a decision in December 1983, stating that it did not have the legal authority to deal with this issue further, or, in any event, to award post-judgment interest on its awards. The Board referred to section 19(6) of the Crown Employees Collective Bargaining Act which, in its opinion, provides a mechanism for the enforcement of the Board's awards and the consequent payment of post-judgment interest. Under this section, a decision of the Crown Employees Grievance Settlement Board is enforceable as an order of the court when a copy of its decision is filed at the Office of the Registrar of the Supreme Court of Ontario.

In January, 1984, the complainant contacted our Office with the complaint that the Ministry of Correctional Services had unreasonably refused to pay him post-judgment interest on the Board's award. The complainant was also dissatisfied with the December 1983 decision of the Grievance Settlement Board. The Ombudsman then notified both the Ministry of Correctional Services and the Crown Employees Grievance Settlement Board of his intention to investigate these complaints.

Our investigation revealed that the position taken by the Crown Employees Grievance Settlement Board is valid with respect to its decision that it had no legal authority to grant post-judgment interest on its awards. As the enforcement of awards made by the Crown Employees Grievance Settlement Board is dealt with under section 19(6) of the Crown Employees Collective Bargaining Act, any attempt by the Board to enforce its own awards would be in excess of its jurisdiction and in conflict with the specific provisions set forth in section 19(6) of the Act. The Ombudsman therefore advised the complainant that he could not support the complaint against the December 1983 decision of the Crown Employees Grievance Settlement Board.

Our investigation further showed that the complainant's union had failed to utilize the enforcement procedures provided for under section 19(6) of the Crown Employees Collective Bargaining Act. The representative of the union advised our Office that at the time of the award in November, 1980, judicial review of Grievance Settlement Board decisions was uncommon. As the union was not familiar with this enforcement process and its consequences, the union did not file the award pursuant to section 19(6) of the Act.

Our investigation revealed that the complainant, through no fault of his own, had lost the opportunity to earn over one-and-a-half years' interest on the Grievance Settlement Board's award. Had the union filed the award with the court, the Ministry would have paid interest on the award, so that the payment of interest to the complainant at this time would not have placed the Ministry in any different financial position than it would have otherwise expected itself to be in. The Ministry did not make any financial compensation to the complainant during this time, but the Ministry had the benefit of the use of these monies in its early budget and these monies remained invested in the Treasurer's account with interest accruing. The Ministry would appear to have been unjustly enriched by this non-payment of interest on the award during the one-and-a-half year period in question.

The Ombudsman found that although the Ministry of Correctional Services had no legal obligation to pay post-judgment interest to the complainant, it had an equitable obligation to do so.

The Ombudsman recommended that the Ministry of Correctional Services pay post-judgment interest on the sum of \$10,067 from November 6, 1980 to May 21, 1982. Our Office also recommended that the Ministry of Labour develop and recommend appropriate legislative amendments to the Crown Employees Collective Bargaining Act that would empower the Grievance Settlement Board to grant post-judgment interest on its awards.

In March 1985 the Ombudsman met with the Deputy Minister of Correctional Services to discuss his recommendation, which the Ministry subsequently agreed to accept. The complainant is to receive a cheque for \$2,785 representing post-judgment interest at the rate of 18% per annum on the Grievance Settlement Board award.

The Ombudsman also received a letter from the Minister of Labour, in response to our Office's recommendation concerning the Crown Employees Collective Bargaining Act. The Minister advised that he will bring the matter of post-judgment interest to the attention of the Deputy Attorney General, and will pursue the ramifications of legislative change to the powers of the Grievance Settlement Boards, as well as other boards, agencies and commissions, to award post-judgment interest. The Ombudsman accepted this communication as an adequate and appropriate response to his recommendation.

CORRECTIONAL INVESTIGATIONS

It is unreasonable to expect persons whose rights are legally curtailed because of their status as inmates to respect the rights of other citizens when those inmates are returned to the community unless fair, just and reasonable treatment is accorded them while in custody.

Inmates of correctional facilities are entitled to certain basic rights, for example, the right to a safe and healthy environment, the right to basic amenities, and the right to have all relevant information considered for parole and Temporary Absence Pass applications.

The following cases illustrate how the Ombudsman can assist the Ministry of Correctional Services in protecting some of the basic rights of those charged to its care.

Case Summary 16

An inmate at a detention centre complained that he was required to share a razor with five other inmates. He contended that this was an unsanitary practice, and that the possibility existed that infectious blood diseases, such as AIDS or hepatitis, could be transmitted from one inmate to another.

Our investigator discussed the complaint with the medical staff at the detention centre. He was informed that the Chief Medical Officer and the Nursing Coordinator shared the inmate's concern, because there is no way to identify an individual inmate with an infectious blood disease until a complaint is made and blood tests are completed.

After our Office had established that the practice of sharing razors among inmates was common in provincial correctional institutions, we advised the Deputy Minister of our intention to investigate the matter. He then arranged to have the problem discussed at the Divisional Management Committee of the Ministry.

As a result, a new policy was formulated: each inmate was to have his own disposable razor, or else the razor and blade being shared must be disinfected each time they are transferred from

one inmate to another. A Ministry Directive outlining the new policy was forwarded to the Superintendents of all provincial correctional institutions.

Case Summary 17

An inmate at a Northern Ontario jail complained that his cell had been sprayed with pesticide notwithstanding that he and a fellow inmate were confined within. His repeated requests to be released from the cell until the odour dissipated had been ignored. When our investigator discussed the matter with the Superintendent, the Superintendent readily agreed to spray pesticides only during those times when the cells were empty.

The Superintendent told our investigator that although the chemical used, Diazinon, did emit an odour, the odour was not overwhelming, and the Pest Control Service had assured him that it would not constitute a health hazard.

Our investigator recalled that our Office had investigated a similar complaint at another Ontario jail where the same chemical, Diazinon, had been used to spray the cells. During that investigation, the Ministry of the Environment confirmed that Diazinon could cause nausea, headaches, and other health problems. As a result of that investigation, the jail discontinued using Diazinon, and substituted a less toxic, odourless material called Ficam.

On February 11, 1985, the investigator wrote the Deputy Superintendent, outlining in detail the findings of our earlier investigation. On February 25, 1985, the Deputy Superintendent advised our Office that following discussions with the District Pesticides Officer of the Ministry of the Environment, the spraying of Diazinon would be discontinued and Ficam would be used in its place.

Case Summary 18

An inmate who had been placed in a segregation cell under close confinement as punishment for an institutional misconduct, complained that he had not been allowed a mattress to sleep on.

A review of the institutional policy at the correctional centre where the complainant was incarcerated revealed that inmates found guilty of a misconduct and sentenced to close confinement were not entitled to the use of a mattress while in the segregation cells.

Our investigator then conducted a survey of other provincial correctional institutions and established that most other institutions provide mattresses at night, unless an inmate attempts to destroy the mattress.

When the investigator advised the Superintendent of the Correctional Centre of the results of the survey, the Superintendent agreed to discuss the matter with the Regional Director.

Subsequently, the Superintendent wrote our Office stating that the institution's standing orders had been revised, and that inmates undergoing punishment in segregation cells would be allowed to have mattresses during night hours, in accordance with the practice at other Ministry institutions, which had previously been endorsed by the Deputy Minister.

Case Summary 19

This resident of a Community Resource Centre had been denied parole at a hearing held on August 13, 1984 before a Regional Parole Board of the Ontario Board of Parole. When his written application for a rehearing, made the same day, was also denied, he contacted the Ombudsman's Office.

The complainant had immediately applied for a rehearing because he felt he had not conducted himself well before the Board. In his application, he explained to the Board that he had been poorly prepared for the hearing because he was unfamiliar with Board procedures.

The Vice-Chairman of the Regional Board advised our Office that the parole had been denied because in the opinion of the Board the complainant would benefit from continued counselling at the Community Resource Centre. The Board had not granted a rehearing as it could find no valid reason to change its original decision. The Vice-Chairman advised our Office, however, that in light of the information our Office had supplied, the matter would be reviewed at its next Regional Board meeting.

At its meeting the Board decided to grant the complainant a further parole hearing. On November 2, 1984, the Vice-Chairman informed our Office that the complainant had been paroled on October 24, 1984.

Case Summary 20

An inmate at a correctional centre contacted the Ombudsman because his several applications for a Temporary Absence Pass had been denied on the grounds that there were six criminal charges against him still outstanding in the Province of Quebec. The complainant was unsuccessful in his attempts to convince the prison authorities that these charges had already been dealt with. He was anxious to be granted the pass as he wanted to look for a job prior to his release date.

Our investigator checked with the correctional centre's records department and was informed that although a letter had been sent to the Chief Prosecutor in Quebec inquiring as to whether the charges still existed, as yet no reply had been received.

The investigator then telephoned the Chief Prosecutor and was referred by him to the Crown Attorney in Montreal to whom the Chief Prosecutor had assigned the inquiry. The Crown Attorney confirmed that there were no outstanding charges against the complainant in Quebec, and at our investigator's request readily agreed to telephone this information to the correctional centre and follow it up immediately with a written confirmation. Shortly thereafter, the complainant was granted an early release Temporary Absence Pass.

Case Summary 21

Before he was incarcerated in a correctional centre, this complainant had subscribed to a Marxist-Leninist newspaper. He arranged to have the newspapers forwarded to the institution, but when they arrived, the Superintendent refused to allow him access to them. Instead, each copy was put with the personal belongings held in safekeeping for the complainant pending his release.

The Superintendent explained to our investigator that because inmates had access to all local newspapers, certain periodicals and newspapers of the type subscribed to by the complainant were not given to them, but were placed with their property.

The Ministry's Manual of Standards and Procedures states that an inmate can subscribe to any book, periodical or newspaper that is legally permitted to be sold. When our investigator reviewed the Ministry policy with the Superintendent, the Superintendent pointed out that the Manual also gives him the authority to refuse to give an inmate anything he considers not to be in the best interests of the inmate, or which might affect the security of the institution. However, the Superintendent said that he would reconsider his position in this case.

Subsequently, our investigator was informed that the Superintendent had revised his policy. The staff had been instructed to allow the complainant access to all copies of his newspaper as they were received, and he was also given those copies which had previously been withheld.

WORKERS' COMPENSATION BOARD

APPEALS

The Workers' Compensation Board does not have a time period limiting appeals. It is always open to a worker to appeal a decision some time in the future. We are sometimes asked to investigate a decision which deals with an accident that happened 20 years ago. In this case, we were able to assist a worker who suffered an accident 40 years ago; however, without assistance from other sources, we can be limited in obtaining information about events which happened many years ago.

Case Summary 22

On September 11, 1944, a 27-year-old Timmins woodcutter was injured when a pile of wood fell, struck him on the back of his head, and pushed him forward onto a circular saw. He suffered severe lacerations to his face and subsequently lost his right eye. At the time of the accident, he was told that his employer had no Workers' Compensation Board coverage. His employer had a contract with the Town of Timmins to cut firewood for families on relief.

Thirty-seven years later, he requested that the Board grant him entitlement. His request was prompted by a suggestion of a Board employee when he was being examined for another compensable condition.

In 1983, the Board concluded that the business of the individual for whom he worked was not covered under the Act in 1944 and therefore, he was not entitled to benefits.

During our preliminary investigation, with the kind cooperation extended by the City of Timmins, additional documentation was obtained and referred to the Board for its consideration. The information concerned the nature of the contracts that the employer had signed with the Town of Timmins.

Based on the information submitted by my Office, the Board revoked its previous decision, and found that although the employer was not covered, the Town of Timmins was ultimately responsible for the worker's coverage.

In July 1984, forty years later, the Board granted the injured employee entitlement for the eye he lost in 1944.

MEDICAL EVIDENCE

Medicine does not always provide us with definitive statements on cause and effect. The Workers' Compensation Board is therefore left with the difficult task of deciding cases in the absence of clear scientific knowledge and must be dependent on the opinions of experts. In the following case, we obtained a further opinion which contributed to the Board's reconsideration of the degree of compensable disability, and resulted in an increase in the complainant's permanent disability award.

Case Summary 23

In March 1965, while working as a shoe repairman, this worker, then aged 45, injured his low back and right shoulder while assisting another worker moving machinery weighing 200 to 300 pounds. Although at the time of the accident he felt only a twinge of discomfort, by the next day he was suffering severe pain. The pain persisted, and when the worker later returned to work he found he could work only part-time, when his condition permitted. Although he consulted numerous orthopaedists, none could diagnose the reason for his continuing pain in the lumbosacral area.

It was not until 1971, when the worker first underwent a series of examinations by rheumatologists, that he was diagnosed as having ankylosing spondylitis, a progressive inflammatory disease affecting the larger joints of the body. In 1975, following a report by a Board doctor that the worker was then disabled by ankylosing spondylitis, and that he had been considerably more disabled in the past, the Board increased the 10% permanent disability pension awarded in 1971 to 50%, on the basis that the accident had aggravated a pre-existing condition. The Board also awarded arrears, but the arrears were minimal, commencing in September 1975, only three months prior to the worker's medical examination. In November 1979, the Appeal Board denied the worker's appeal for arrears covering a longer period.

The worker's general health continued to deteriorate; he developed gastrointestinal difficulties and weight loss. It was agreed by both the Board doctors and the worker's treating physicians that the drugs necessary to treat ankylosing spondylitis can lead to gastrointestinal upset. In July 1982, the Appeal Board denied the worker's claim for compensation for gastrointestinal difficulties on the basis that ankylosing spondylitis was a totally non-compensable condition. At the same time, the Appeal Board denied the worker's request for permanent disability benefits to 100%. Although the Appeal Board recognized that the worker was totally disabled, it stated that it could only compensate him for disability arising in the low back and right shoulder.

In view of the Board's reluctance to admit a full causal relationship between the accident and the activation of the ankylosing spondylitis, our Office sought the opinion of a rheumatologist. The specialist reported that this disease rarely manifests itself after the age of 45. In his mind, there was no doubt that the 1965 injury was associated with the appearance of the disease.

In January 1984, the Temporary Ombudsman wrote the Chairman of the Workers' Compensation Board, making a tentative recommendation that the Board grant the complainant 100% compensation commencing September 1975; entitlement for the gastrointestinal and weight loss problems; and an award greater than 10% commencing July 1972.

In his response, the Chairman declined to grant greater benefits, citing the opinion of the Board doctors that the injury had been minor in

nature, and was not associated with the development of the ankylosing spondylitis. The Board also relied on a search of scientific literature on this condition, which had apparently failed to reveal a causal connection between the activation of ankylosing spondylitis and trauma.

The Ombudsman disagreed that the injury was minor in nature, as the worker had been able to work only part-time following the accident. He pointed out that the medical literature was inconclusive and contradictory, and stated that reliable and credible evidence had been obtained from the specialists in rheumatic diseases, who are knowledgeable about current thought in the field. He stated that while the Board doctors may have knowledge about trauma, they are not experts in rheumatic diseases or the etiology of ankylosing spondylitis. The Ombudsman was of the view, based on the evidence, that prior to the accident the complainant's condition was dormant, and in view of his age the condition may well have remained dormant for the remainder of his life, but for the accident.

Following further discussions between members of our staff and that of the Board, the Board agreed to increase the complainant's permanent disability award to 75% effective September 1975, and to increase his permanent disability award from 10% in July 1972 to 20% in July 1973, and 30% in July 1974.

The complainant was pleased with the resolution of his complaint and sent a note of thanks to our Office.

RATING SCHEDULE

The Workers' Compensation Board relies on a rating schedule to determine the degree of permanent disability. There are some conditions which are not referred to in Ontario's schedule and for those situations, the Board can refer to other schedules for guidance such as the American Medical Association's schedule. The following case illustrates how reference to the American Medical Association's schedule benefited an injured worker.

Case Summary 24

The worker suffered a knee injury and was required to take many painkillers for this

problem. As a result of the medication, he developed an ulcer which the Board did include in his entitlement.

Following an examination in June, 1982 for a pension assessment, a Board doctor recommended that this complainant receive an award of 20% for a dumping syndrome, a condition demonstrated by frequent regurgitation, nausea, and sweating, which had developed following gastric surgery for his ulcer. As part of a December 1982 decision, the Appeal Board stated that there had been no appreciable change in the complainant's stomach disability since his pension examination in June 1982, and denied an increase in benefits.

In a September 1984 letter, we requested clarification from the Board as to how the 20% figure had been arrived at. We noted that the Board's Ontario Rating Schedule does not contain criteria for evaluating gastric impairment. We had been advised that in the past, when the Ontario Schedule does not contain a specific rating, the Board looks to the American Medical Association's schedule for guidance. We pointed out that the AMA Guide to the Evaluation of Permanent Impairment is specific as to a rating for the condition suffered by the complainant, and we pointed to an example given in the AMA Guide of a woman who developed dumping syndrome after a gastric resection where the impairment was rated at 30%.

Following receipt of our letter, the Appeal Board reconsidered this portion of its December 1982 decision, and rated the gastric problem at 30%, stating that since the Board's own Rating Schedule does not contain criteria for evaluating gastric impairment, it would be reasonable to accept the guidelines established by the American Medical Association's Guide as the appropriate standard by which to assess the complainant's gastric disability.

DETERMINATION OF BENEFITS

The same medical diagnosis does not always result in the same type of payment. The degree of disability, and the extent to which the compensable accident contributed to the disability, are major factors in the determination of the benefits to be granted by the Board. In the two cases cited below, each worker suffered from leg ulcers brought on by accidents at work. The

amount of compensation paid was significantly different.

Case Summary 25

In 1966, while working, this man suffered a deep puncture wound to his right lower leg. Following his injury, he had recurrent ulcers on his leg which were painful and limited his mobility.

The Workers' Compensation Board recognized that he suffered damage to his veins as a result of his accident, and also accepted that the recurring ulcers were a manifestation of his vascular problems. The worker was granted a 35% permanent disability award to compensate him for his ongoing leg problems.

In February 1983, the Board was advised that the worker had been off work since November 1982, and temporary total disability benefits were requested from that date. However, in a November 1983 decision, the Appeal Board denied benefits, stating that the medical evidence did not support the worker's claim that he was disabled to a greater extent since November 1982 than that recognized by his permanent disability pension.

Our review of the medical information revealed that, although the worker's treating physician had submitted a report to the Board stating that he had seen the worker in November, 1982 for a stasis ulcer, the doctor did not comment on the degree of disability at that time.

We therefore wrote the attending physician requesting further information. The physician stated that the ulcer was still open when he examined the worker in January 1983, rendering the worker disabled. By the worker's next visit in June 1983, the ulcer had completely healed.

On the basis of this new information, and after a review of the physician's report by its Surgical Consultant, the Appeal Board, in a December 1984 decision, granted the worker temporary total disability benefits from November 7, 1982 until June 7, 1983.

Case Summary 26

An auto worker banged his leg at work and developed an open sore, which took some time to heal. The Workers' Compensation Board

recognized that an accident had occurred during the course of employment. Because the worker did not lay off from work, no benefits were paid directly to him.

In 1971 and again in 1978, he suffered further leg injuries which eventually healed. The worker is still employed in the auto industry, although he does have recurring ulcers on his leg.

The worker requested a permanent disability award for his recurring ulcers. The Board denied this request because it was of the opinion that the recurring problem was caused by an underlying vascular problem.

During our discussions with the complainant, he adamantly denied any ulcer problem prior to the original accident at work.

In order to gather further medical information on the compensable nature of the worker's disability, we corresponded with the worker's treating dermatologist. The dermatologist stated that the worker unquestionably suffered from work-induced ulcerations, complicated by his proneness to varicose veins and to diabetes. He did not consider that the varicose vein condition was related to his occupation, but stated that the worker would always be prone to skin ulcerations.

The dermatologist's report was submitted to the Board as new information. However, the Board did not consider the report to be sufficient evidence to cause it to change its view of the claimant's case, stating that it considered that its responsibility had ended when the ulceration cleared.

Because the Ombudsman felt that the dermatologist's report was in some ways supportive of the worker's claim, a second independent medical opinion was sought from an expert in occupational and environmental health. This doctor reported that the venous abnormality in both legs would have been present irrespective of whether the complainant sustained the industrial injuries. The doctor therefore felt that the worker would not have been entitled to additional compensation benefits.

In this case the Ombudsman did not support the worker. Although one independent medical opinion was supportive of the worker's claim that his ulcerations were work-induced, both opinions related the condition to a predisposing varicose vein problem, which had to be present before the dermatitis and related

complications could occur. We therefore concluded that the Board had not acted unreasonably by limiting the worker's entitlement to those periods when the ulcers were clearly related to work incidents.

CALCULATION OF BENEFITS

Once the decision to grant entitlement for an accident has been made by the Workers' Compensation Board, there still remain decisions concerning the calculation of benefits. The methods of calculation are not specifically outlined in the Workers' Compensation Act. The Board must make decisions in terms of policies which are publicly available. During our investigation of such cases, we rely heavily on the Board's policies in order to determine the reasonableness of the Board's practices.

Case Summary 27

This complainant, the owner/operator of a tractor-trailer truck, had only been employed for nine days at a trucking firm when he fell approximately 12 feet from the top of his truck while placing a tarpaulin over his load, suffering significant injuries. He had begun work at 4:00 a.m. that day, and completed one trip. It was while loading for a second trip at 1:30 p.m. that the accident occurred.

The worker appealed the amount of compensation awarded by the Workers' Compensation Board, contending that the calculation of his earnings basis should have included his earnings on the day of the injury. If the earnings for the day of accident were included in the calculation of his payments, his benefits would have been higher.

In July 1983, the Appeal Board concluded that the compensation rate had been calculated correctly and in accordance with the Workers' Compensation Board policies and procedures, and denied the appeal.

In February 1984, the Ombudsman wrote the Chairman of the Workers' Compensation Board, pointing out that while the Workers' Compensation Act states that a worker's average earnings shall be computed in a manner best calculated to give the rate per week or month, it gives no details as to how the computation should be made. He stated further that while it is reasonable for the Board to exclude earnings on

the day of an injury when the worker has completed only a portion of the day's work and earned only a portion of the day's pay before an accident occurs, this method of computing a worker's average earnings penalized the worker in the present case. The worker had completed eight and one-half to nine hours' work before his accident, and had earned more than on previous full days. Excluding his earnings on the day of his injury therefore artificially deflated his average earnings. The Ombudsman tentatively recommended that the Appeal Board revoke its decision and include the worker's earnings on the day of his accident in the calculation of his earnings.

After considering the Ombudsman's submissions, the Appeal Board agreed that the Workers' Compensation Act does not preclude the use of earnings on the day of an accident if by so doing the worker will derive some benefit, and in an April 25, 1984 decision concluded that the compensation rate should be adjusted to take into account the worker's earnings on the day of his accident.

Case Summary 28

This complainant was injured in March, 1976 when he was struck and knocked down by a portable tire rack.

He returned to work in March, 1977 and in 1979 was granted a partial pension for a back disability.

In June 1980, the complainant laid off work with back trouble, receiving \$250.05 per week in compensation benefits based on his June, 1980 earnings. Following improvement in his condition, the Board agreed to sponsor an upgrading course beginning in March 1981, granting him a maintenance allowance of \$197.15 per week based on his pre-accident, March 1976 earnings. However, the Board later raised the maintenance allowance to \$250.05 per week on the basis of "need".

The complainant remained in the upgrading course until February 1983, a total of 104 weeks, but was refused a legislative amendment adjustment to his maintenance allowance, on the basis that he was already being paid in excess of the benefits to which he was entitled. The amendment provided for a 10% increase in payments if the worker had been in receipt of benefits for more than 52 weeks.

On February 17, 1984, the Temporary

Ombudsman wrote the Chairman of the Workers' Compensation Board, in accordance with section 19(3) of the Ombudsman Act, and tentatively recommended that the Appeal Board revoke its decision and grant the complainant entitlement to the legislative amendment adjustment to his maintenance allowance.

The Temporary Ombudsman's tentative recommendation was based on his belief that the complainant had been entitled to the \$250.05 weekly maintenance allowance as of right, not on the basis of need, and the complainant was therefore entitled to the legislative amendment adjustments. It was the Temporary Ombudsman's view that in February 1981, the Board should have continued basing computation of the benefits on the complainant's earnings in June, 1980 when the complainant stopped working following a recurrence of his disability, rather than on his 1976 pre-accident earnings.

The Chairman responded on June 4, 1984, stating that since the complainant was not in receipt of temporary disability benefits in February 1981, he was not entitled under the Workers' Compensation Act to legislative amendment adjustments, and therefore the Board was prevented by statute from complying with the Temporary Ombudsman's tentative recommendation.

A further review of the matter by this Office revealed that Board practice does not confine application of the legislative amendment adjustments to temporary disability benefits. Application is, in fact, extended to maintenance allowances. In light of this information, the Chairman was contacted on October 24, 1984 with the request that the Appeal Board reconsider its decision.

On January 4, 1985, our Office was advised that after considering relevant Board policy and practices in the context of the complainant's claim, the Board had reconsidered. The complainant was granted an adjustment in his benefits for the period February 5, 1981 to February 14, 1983.

RECOMMENDATIONS DENIED

This year I am reporting 19 cases in which the Ministry or Board concerned refused to implement my recommendations.

In one case I recommended that the Ministry of Consumer and Commercial Relations honour

certain commitments made to members of a homeowners association.

In another case I made several recommendations to the Ministry of Community and Social Services and the Social Assistance Review Board concerning a complainant's contention that the cancellation of his Family Benefits was unreasonable.

In another case I recommended that the Liquor Licence Board of Ontario compensate a former inspector who contended that he had been unfairly pressured into resigning his position.

Two cases involved the Ministry of Consumer and Commercial Relations and the Residential Tenancy Commission. In both cases I recommended that the Commission reconsider a decision and that the Ministry prepare appropriate legislative amendments to the Residential Tenancies Act.

Two cases involved the Ministry of Health and the Ontario Health Insurance Plan. In one case, I recommended that the Public Hospitals Act be amended to require public hospitals to accept referrals from chiropractors and osteopaths for radiology services in hospital out-patient departments. In the other case I recommended that OHIP reimburse a complainant for out-of-province medical treatment and that a section of the Health Insurance Act be amended to remove an existing discriminatory gap between mental and physical illness.

Another case involved the Ministry of Transportation and Communications where the construction of a highway reduced the value of a complainant's property. I recommended that the Ministry of the Attorney General refer the issue of compensation for injurious affection arising from the use of public works to the Ontario Law Reform Commission for a report and recommendations.

Finally, the Workers' Compensation Board refused to implement recommendations in eleven cases which I decided to report to the Legislature. Seven cases involved entitlement to benefits. One case involved an award for a psychiatric condition. Two cases dealt with the level of pensions granted. One dealt with the method of calculating the pension award as well as initial entitlement for a disability.

The detailed summaries for all of these cases appear in Volume II.

ONTARIO OMBUDSMAN STAFF

MARCH, 1984

ALLAN, John
ARKELL, Tim
BAILIE, Sam
BARBER, Jo-Anne
BITTIRA, Gangu
BOHNEN, Linda
BOOTHBY, Paula
BOURNS, Maureen
BRADBURY, Laura
BRIDGER, Lynne
BUBRIN, Vladimir
CAP, Wanda
CARLINO, Gerry
CATTON, Niki
CHALKE, James
CHAMBERS, Sharon
CHIC, Jacquie
CLARK, Deta
COLEY, Andy
CONROY, Nadene
COOLMAN, Joyce
CROSSLEY, Barbara
DEPOCAS, Elise
DESBIENS, Pauline
DOHERTY, David
DRAKE, Karen
DUNNILL, Michael
ELDRIDGE, Carole
ESTORBA, Josie
EVANS, Cathy
FELDMAN, Cara
FENTON, Mary Jane
GABRIEL, Elizabeth
GERHARD, Perry
GIORGIO, Rita
GIULIANI, Gary
GRAY, Virginia
GRIFFIN, Dianne
HALPERT, Ivan
HARRINGTON, Ed
HARRISON, Joan
HEAD, Sylvia
HILL, Dr. Daniel G.
HIRST, Barbara
HOBSON, Jim
HOFFMAN, Judith
HOLMES, Jackie
IAHTAIL, Mary Lou
JAMIESON, Marion
JARRETT, Maureen
JOHNSON, Gini
JONES, Christine
JOYAL, Janet
KAGAN, Kenneth

KATAMAY, Olga
KEIL, Martha
KERSHAW, Janet
KING, Dianne
KNUDSON, Inez
LAMPKIN, Lorna
LANGELIER, Pierre
LA ROSA, George
LATINCIC, Mary Ann
LEE, Allan
LEGARDO, Lourdes
LEWIS, Catherine
LOGAN, Rosemary
LUCAS, Lourine
LYNCH, Gwen
MACDONALD, Andrew
MACEROLLO, Bob
MACKEY, David
MACNEE, Katie
MALOUF, Katy
MARKIEWICZ, Eva
MARTIN, Christine
McCOLLIN, Phyllis
McKAY, Catherine
McLEOD, Maret
McNAMARA, Cecilia
MENNIE, Florence
MESLIN, Eleanor
MILLS, Allan
MOODY, Eric
MORIN, Gilles
MORRISH, Ginette
MORRISON, Gail
MORTON, Margret
MOXLEY, Susan
NAISH, Doug
NOCK, June
O'CONNOR, Tom, Q.C.
ONEN, Zeynep
ORTVED, Janet
PANJWANI, Ghulam
PASKAR, Roland
PELLETIER, Allan
REAUME, Elaine
ROBERT, D'Arcy
ROBSON, Donna
RODGERS, Faye
ROWE, Robin
SCHARBACH, Stephen
SCHULZ, Wolfgang
SCOTT, Mae
SEALEY, Carol
SEMENCIW, Joe
SIMPKINS, Jan

SKENE, Tom
SMITH, Virginia
SORA, David
SOUKIE, Claude
SOUSA, Maria
STEADMAN, Dorothy
STUART, Gerald
TAMAYA, Fern
TAYLOR, Blair
TESLIA, Valerie
THEN, Milan
THOMAS, Fred
THOMS, Jo-Anne
TIMOL, Yunus
TORRANCE, William
VAN KLEEF, Joy
VIRC, Elizabeth
ZACKS, Michael

LANGUAGE FACILITIES

*The staff of the Ombudsman's Office is
multilingual. We can communicate in 24 languages.*

Cree
Croatian
Czech
Dutch
Estonian
English
Filipino
French
German
Gujerati
Hindi
Italian
Macedonian
Ojibway
Polish
Portuguese
Russian
Serbian
Slovak
Slovenian
Spanish
Turkish
Ukrainian
Yiddish

ONTARIO OMBUDSMAN OFFICES

TORONTO

125 Queen's Park
Toronto, Ontario
M5S 2C7
Tel: (416) 596-3300

OTTAWA OFFICE

#702, 151 Slater Street
Ottawa, K1P 5H3
Tel: (613) 234-6421

KENORA OFFICE

223 First St. South
Kenora, P9N 1C2
Tel: (807) 468-3091

NORTH BAY

#203, 591 Main St. E
North Bay, P1B 1B7
Tel: (705) 476-5800

THUNDER BAY OFFICE

#701, 1265 Arthur St. East
Thunder Bay, P7E 6E7
Tel: (807) 623-5058

TIMMINS OFFICE

81 Balsam Street South
Timmins, Ontario
P4N 2C9
Tel: (705) 268-2161

IN MEMORIAM



ARTHUR EDWARD MARTIN MALONEY, Q.C., LL.D.
1919-1984

During the tenth anniversary year of this Office it is fitting to commemorate the death of its most illustrious pioneer.

On September 20, 1984, Arthur Maloney, Q.C., our first Ombudsman, passed away after a lengthy illness. His death was a great loss not only to all of us who knew him, but also to all Ontarians and, in fact, all Canadians.

He was one of Canada's most distinguished champions of human rights. As a fervent and eloquent advocate before the courts, as a progressive and compassionate Member of Parliament, and as a tireless and extraordinary Ombudsman, his dedication to the preservation of our civil liberties is legendary.

We at this Office will always be grateful to Arthur Maloney — for his personal friendship, for his excellent work of creating an Ombudsman's function that he was fond of describing as "second to none in the world", and for his very gracious counsel and assistance up to the time of his death.

If a man's size can be measured by his service to the humble and underprivileged, the disadvantaged and those who have no voice, then Arthur Maloney was a giant.

His life was an inspiration for all who aspire to serve the public. For that we thank him.

CA20N

PM

-A56

THE OMBUDSMAN OF ONTARIO

10th ANNIVERSARY

ANNUAL REPORT
1984-85

VOLUME II



INTRODUCTION

Volume II is devoted entirely to detailed summaries of cases where the recommendation of the Ombudsman was denied by the governmental organization.

Tables of recommendations outstanding from previous reports are included as appendices.

TABLE OF CONTENTS

	<u>Page</u>
1. Detailed Summary - Ministry of Consumer and Commercial Relations	1
2. Detailed Summary - Ministry of Community and Social Services (Social Assistance Review Board)	31
3. Detailed Summary - Liquor Licence Board of Ontario	42
4. Detailed Summary - Ministry of Consumer and Commercial Relations (Residential Tenancy Commission)	52
5. Detailed Summary - Ministry of Consumer and Commercial Relations (Residential Tenancy Commission)	59
6. Detailed Summary - Ministry of Health (OHIP)	72
7. Detailed Summary - Ministry of Health (OHIP)	79
8. Detailed Summary - Ministry of the Attorney General	86
9. Detailed Summary - Workers' Compensation Board	96
10. Detailed Summary - Workers' Compensation Board	110
11. Detailed Summary - Workers' Compensation Board	116
12. Detailed Summary - Workers' Compensation Board	123
13. Detailed Summary - Workers' Compensation Board	131
14. Detailed Summary - Workers' Compensation Board	143
15. Detailed Summary - Workers' Compensation Board	151
16. Detailed Summary - Workers' Compensation Board	159
17. Detailed Summary - Workers' Compensation Board	169
18. Detailed Summary - Workers' Compensation Board	185
19. Detailed Summary - Workers' Compensation Board	190

APPENDIX A

Recommendations Denied Tables	200
-------------------------------	-----

APPENDIX B

Recommendations Under Section 22(3)(d) or (e) as Tables	203
---	-----

DETAILED SUMMARY NO. 1

This complaint against the Ministry of Consumer and Commercial Relations was formally made when the complainant wrote to our Office on March 4, 1981. The complainant had first written to our Office on September 15, 1980.

On March 18, 1981, Mr. Donald R. Morand, then Ombudsman, wrote to advise Mr. D. A. Crosbie, Deputy Minister, Ministry of Consumer and Commercial Relations, of his intention to investigate this complaint concerning the Ministry's failure to honour certain commitments made to the members of a Homeowners' Association, on whose behalf the complainant was acting. Mr. A, the Executive Director of the Business Practices Division, responded by letter dated April 1, 1981 with his view of the matter.

Following our investigation into the matter, the Temporary Ombudsman wrote to Mr. Crosbie on September 21, 1983, pursuant to the provisions of section 19(3) of the Ombudsman Act, to advise Mr. Crosbie of the possible conclusions and recommendations he might make with respect to the complaint.

By letter dated December 16, 1983, Mr. Crosbie responded to the Temporary Ombudsman's letter. The representations in that response are considered in detail in this report.

My investigators have reviewed all the information and documentation concerning the actions of the Ministry relative to this complaint. Mr. A and Mr. B, Division Counsel for the Ministry, were personally interviewed. The complainant was also interviewed, as were other members of the Homeowners' Association. In addition, the Executive Director/Registrar of HUDAC, Mr. C, was contacted and interviewed.

A brief summary of the complaint and the Ministry's commitment to the homeowners follows.

The complainant and members of the Homeowners' Association purchased homes built prior to the enactment of the Ontario New Home Warranties Plan Act (the Act) in a subdivision. Most of the homes were first purchased between 1971 and 1973. The complainants contended that the homes had defects, and they unsuccessfully attempted to get the builder to carry out repairs.

The Homeowners' Association sought assistance at the municipal and federal levels of government, and several court cases against the builder were instituted. No assistance was forthcoming from either level of government, and the court cases were generally unproductive.

On May 10, 1978, Mr. Ross McClellan, MPP, presented a petition to the Ontario Legislature on behalf of 325 members of the Homeowners' Association. The petition complained about the defects in the homes of the homeowners and the fact that the homeowners had been unable to obtain compensation for these defects from the builder. Mr. Drea, the then Minister of Consumer and Commercial Relations, agreed to look into the matter. On August 22, 1979, Mr. Drea wrote to Mr. McClellan about this matter and stated:

... you will recall that I pledged my endeavours to find a fair and equitable solution for these people.

I am pleased to report that I have reached an agreement with the HUDAC Home Warranty Program where these homes will be brought up to standard just as though they were covered by the Warranty Program, which came into being after they were built and occupied....

On October 10, 1979, in response to a question from a Committee member, Mr. Drea made the following statements before the Standing Committee on Administration of Justice, as reported in Hansard:

I have worked out an arrangement whereby all those homes will be repaired and I have communicated that....

They will be brought up to standard...

I would like to get those homes repaired by the end of the year if possible. But it will be done at no cost to the homeowner.

Before the same Committee, the following exchange was reported in Hansard on October 12, 1979:

Hon. Mr. Drea: ... the arrangement I have worked out is that the deficiencies will be remedied, whatever the deficiencies are.... somebody would be brought in at their convenience, free of charge to them, the place would be rectified up to the present standard--I want to emphasize that one word "present"

You put it in place exactly as though it had been covered by the HUDAC home warranty program....

Mr. McClellan: Who will be doing the repairs?

Hon. Mr. Drea: I don't think that has been decided yet. The question was left as to whether [the builder] would be doing it or whether HUDAC would be doing it, and if [the builder]

refused to do it then HUDAC would do it, but it would be done to HUDAC's specifications, on the basis that if the person who has the remedial work done is not satisfied with it, it would be exactly the same as if he or she had had remedial work done under the HUDAC home warranty program and was not satisfied.

We are trying to work out an easy way, one that's very fair to them, where they don't feel "Okay, someone is coming in and I don't have a voice in it if he says the floor is straight". It will be done at no cost to them and at their convenience.

The following points are apparent to me from Mr. Drea's early statements on the issue:

1. There was an agreement between the Ministry and HUDAC.
2. Repairs to the houses were to be made.
3. The repairs would be made according to the HUDAC standards at that time.
4. The repairs would not be done at the homeowners' expense.
5. The repairs would be done at the homeowners' convenience, and they would have some input as to what was going to be done.

Despite these initial promises by Mr. Drea, the homeowners have never had their homes repaired, and this is the substance of their complaint to this Office. Our investigation involved a review of the initial commitment to the homeowners from the Minister and his officials, the attempts to implement the commitment by the Ministry, the nature of the "agreement" or "commitment" between the Ministry and HUDAC, the written offer of September 8, 1980 from the builder to HUDAC and the Ministry to repair the homes, which offer was never communicated to the homeowners, and the homeowners' conduct throughout the matter.

In the Temporary Ombudsman's letter to Mr. Crosbie of September 21, 1983, he stated the following possible conclusions: that the Ministry had apparently misunderstood the commitment from HUDAC and had unreasonably failed to document the commitment; that the Ministry unreasonably failed to inform the homeowners of the one offer to repair the homes from the builder which was successfully negotiated by HUDAC; and that the Ministry unreasonably failed to apprise the homeowners of what the HUDAC inspectors found and advise them of the Ministry's final disposition of the matter. The Temporary Ombudsman indicated that a recommendation he might make was that the Ministry compensate at least those homeowners who would have benefited had they accepted the builder's offer of repair as negotiated by HUDAC. This offer encompassed those

homeowners who were the original purchasers of their houses and whose houses were suffering serious structural defects to their roofs or foundations. The Temporary Ombudsman also indicated that he might recommend that the Ministry send reporting letters to the homeowners who had submitted deficiency lists with respect to the defects in their homes at the outset of the Ministry's involvement in the matter.

As indicated, Mr. Crosbie responded by letter dated December 16, 1983 to these possible conclusions and recommendations. I have considered the representations made in Mr. Crosbie's letter and reviewed the evidence with respect thereto. I have set out this evidence and the remainder of the evidence relating to the Homeowners' Association's complaint below. I have attempted to do so by taking excerpts from Mr. Crosbie's letter and then discussing the evidence on the points raised in the excerpts.

- A. "... notwithstanding our best efforts, and aided in part by activities of the Homeowners' Association, we were not able to bring the situation to a satisfactory conclusion Notwithstanding our efforts, some of which you reproduce, to reassure them [Homeowners] of the fact that to our knowledge negotiations were going well, the Homeowners' Association took what a representative described in a conversation to be "a calculated risk" and went to the press with its story.... The result was that the Homeowners' Association was pressing the Ministry for a total package covering alleged deficiencies in all homes whether still owned by original purchasers or not, while at the same time the builder, apparently seeing no goodwill as a result of the negative publicity, curtailed its offer. The offer when produced covered only original purchasers.... Had the Association not precipitated the matter by the untimely press conference, we might have produced laudable results...." (Statements made in Mr. Crosbie's letter of December 16, 1983)

I understand Mr. Crosbie to be saying that:

1. The Ministry used its best efforts to do everything it possibly could;
2. The builder, at one point, was willing to do much more for the homeowners than was indicated in the one offer it finally did produce;
3. It was the homeowners' own fault that their homes were not ultimately repaired because of the negative publicity they generated against the builder, which resulted in a curtailment of the builder's offer.

From a review of the evidence, it is clear that the Ministry and HUDAC officials did indeed expend a great deal of time and effort in attempting to reach a satisfactory resolution of this matter. Nevertheless, when one reviews the evidence, it becomes clear that the following comments are also appropriate:

1. The Ministry apparently misunderstood the "commitment" it had with HUDAC, which caused many more misunderstandings to develop.
2. Statements made by Ministry officials, in attempting to implement Mr. Drea's promises, were not always consistent with his promises, which caused anxiety and mistrust among the homeowners.
3. The Ministry failed to fully communicate to the homeowners the "process" that was involved, perhaps because it never fully understood the process itself. This resulted in misunderstandings as to the builder's role and the inspection process and ultimately caused the failure of the Ministry to communicate to the homeowners the only offer received from the builder.
4. There is little evidence to support a conclusion that the builder was prepared to do any more than what it ultimately offered to do.
5. There is little evidence to support a claim that publicity affected the builder's offer, and even if such a claim could be supported, the homeowners cannot necessarily be blamed for the publicity they generated as this was, in part, a result of the frustrations and misunderstandings that evolved in this matter. The publicity was largely directed at the Ministry and not the builder.
6. The Ministry appears to have let the matter go unresolved without officially advising the homeowners of the ultimate disposition of the matter.

The following is a review of the evidence which I feel supports the above-noted comments.

The Ministry's proposed assistance program for the homeowners was reported in the local newspapers in the fall of 1979. From a review of these reports, it is clear that at this stage the Ministry had made its promises to the homeowners without first contacting the builder although, when interviewed by the press, the builder appeared willing to do those repairs which were felt to be necessary. There is no suggestion in the newspaper reports, however, that the Ministry's promises were conditional on what the builder was willing to do. It had made its promises independently of the builder's involvement. At this point, none of the parties involved had a clear idea of the extent of the defects and the nature of the repairs required.

On December 13, 1979, representatives of the Homeowners' Association met with Mr. Drea and other officials of the Ministry. The following are extracts from a newsletter prepared by the Homeowners' Association following this meeting; this newsletter was forwarded to the Ministry under cover of the complainant's letter of December 17, 1979:

The following are the highlights of the program:

1. All [the builder's] Homes will be eligible for repairs, irrespectively [sic] whether at present occupied by original (first) or subsequent owner....
3. All houses will be brought to the present Home Warranty Standards, if it is found that corrective actions are required.
4. The extent of the repairs will be established as follows:
 - each owner will be responsible for preparation of a list [sic] of deficiencies using the attached form (please prepare 3 copies--Ministry, HUDAC, Owner)
 - each house will be inspected by the HUDAC Building Inspectors during the time indicated on the form
 - the owner will be notified by HUDAC about the type and extent of the necessary repairs
 - in case of disagreement between the owner and HUDAC, disputed items will be reviewed by the Ministry of Consumer and Commercial Relations and their decision will be final....

We would like to remind you once again that the credit for the above arrangement is due to Mr. Ross McClellan, who raised the matter in the legislature and to Mr. Frank Drea, the Minister of Consumer and Commercial Relations.

At the time of the complainant's letter of December 17, 1979 to the Ministry enclosing the newsletter, the inspections had already commenced and the complainant in his letter complained about the manner in which they were being conducted, as follows:

The HUDAC inspector did not disclose to any homeowner what the results of his inspections were. In one instances [sic], the inspector would not even disclose, though requested by the homeowner, the Warranty Standard for the fill below the slab-on-grade. Such secretiveness do [sic] not, naturally, inspire

confidence in the inspections undertaken. We request that the HUDAC inspector at the end of individual inspection, inform the homeowner what his inspection findings are.

Mr. Crosbie's letter of December 16, 1983 suggested that the correspondence which we reviewed during our investigation "fails to reflect... the tone taken by the Homeowners' Association". The above-noted correspondence may be an example of this "tone". I would agree that at such an early stage of the Ministry's program to assist the homeowners the complainant, in his letter of December 17, 1979, took a somewhat antagonistic and demanding tone. Certainly, at this stage, the homeowners could be faulted for this approach. However, the homeowners knew that there would be some debate about the type of repairs to be done and wished to have some input into this process as they were promised they could by Mr. Drea. As it turned out, the homeowners were never really given the chance to get sufficiently involved in the inspection process, and this failure led to the communication problems as to the types of repairs that were to be performed and was a major source of anxiety and distress among the homeowners.

In response to the complainant's letter of December 17, 1979, Mr. A wrote to the complainant on December 27, 1979 and stated the following:

My recollection concerning the meeting was that when the comprehensive listing of suspected or known substantial deficiencies is available the Warranty Program will pick it up promptly....

I imagine that the inspectors will continue to go about their initial inspection activity without much dialogue. It is not a question of secretiveness at all. It is simply a question of gathering all available information into one total package and assessing it all on a standardized basis using whatever other expertise is needed to reach one uniform conclusion about the problems.... [Emphasis added]

I think this letter is indicative of two things:

1. that Mr. A introduced the possibility that it was only substantial deficiencies that would be covered (this had not been indicated in Mr. Drea's comments); and
2. that there was no conscious effort to be secretive on the part of the Ministry as to the inspection process, but that the manner suggested was the way it thought the job would be best performed. Mr. Drea, however, had promised that the homeowners would have input into the inspection process.

One hundred and forty-four homeowners submitted deficiency lists to the Ministry in January, February and May of 1980 outlining the defects in their homes. The Ministry had told the homeowners that those who had submitted lists in January and February (approximately 111 homeowners) would be advised by May 15, 1980 of those repairs that would be effected, and that the repairs would begin on June 1, 1980. Unfortunately, HUDAC officials had underestimated the time involved to perform the inspections, and the deadlines were missed. The homeowners were beginning to get very anxious as by then more than six months had passed since the original promises, and the homeowners did not know what the inspectors had found and what repairs would be performed.

Throughout this period there were telephone conversations and written correspondence between the Ministry and the homeowners which essentially reflected the homeowners' desire to know more about what was going on. The Ministry's advice to the homeowners was "to be patient--that things were going a little more slowly than planned--but that things were going to work out". What the homeowners wanted was some input into the inspection process before the repair program was announced. They wanted to assure themselves that their own views of which defects were below HUDAC standards and needed repair corresponded to the results of the inspection process. The homeowners' requests for more involvement were, on some occasions, demanding and abrupt, but the Ministry would not give them any commitment that it would allow their input into the repair program. The homeowners also complained that those homeowners suffering emergency problems such as leaking roofs were not properly being looked after.

The complainant finally wrote to Mr. Drea personally on July 3, 1980 requesting a meeting with the Minister. The complainant made the following statements in his letter:

The homeowners have not even received a notification of the findings of the HUDAC inspectors though the inspection was completed some time ago. Even our simple question to the Ministry whether such a notification will or will not be received so far remains unanswered.

In fact, the inspections were not yet complete at this point.

In the meantime, the matter had again been discussed before the Standing Committee on Administration of Justice on June 12, 1980. Mr. McClellan, Mr. A and Mr. Drea were there, and Mr. A explained that the delay in finalizing the inspection process was partly because HUDAC had underestimated the time it would take to do the inspections and partly because the Ministry was concerned about water damage to roofs and basements and had hired a roofing expert to do a special analysis of the problem. The following are some comments that were made before the Committee as reported in Hansard:

Mr. Simpson: the association did an excellent job. It prepared a form and circulated it out to all the home owners, asking them to fill it in and list the kinds of faults they thought existed in their homes....

We, too, would have liked to have seen the inspection program finished up before now, and we are in the final stages now....

I am hoping we will have some news for these home owners very shortly....

Mr. McClellan: At this point you are not able to give some firm timetable targets for the repair work to actually begin.

Mr. Simpson: As you probably know, we endeavoured to get something going. We anticipated something would be going by way of rectification, and that those things would be dealt with around June 1. We do not feel that HUDAC, having made about a 12-week target, are far off the mark -- just a couple of weeks. I think it is fair to say the builder is ready to sit down and hear the news. He is waiting for the word on this from the association [HUDAC]. The association is still, as I said, in the final stages of assessing all the findings and trying to make some determination. [Emphasis added]

I have not heard from them this week, but I believe the final analysis of the water situation will be concluded this week.

Hon. Mr. Drea: If I could interrupt: Without setting a firm date, we really want the work to commence forthwith, because I do not want it to go on over the winter....

Mr. McClellan: I think the individual home owner should be notified as quickly as possible with respect to the inspection report findings and the determination of what is going to be done. Can you tell me how soon that might be possible to do?

Hon. Mr. Drea: Just as soon as they are completed. I think, in many of the cases, we could probably give it to individuals now. But the group, since they chose to act as an association, wanted it all at the same time....

Mr. Simpson: Everyone will receive a full communication. 'Here it is, Mr. and Mrs. Smith. This is the situation on your house and this is what is proposed.' There will be one communication to each of the owners individually. This was the deal a long time ago....

Mr. McClellan: So the standards with respect to the quality of the workmanship and the repairs will be the standards under the Housing and Urban Development Association of Canada warranty program....

Hon. Mr. Drea: Yes.... We pointed out that if they were not satisfied with the workmanship they would file a complaint with HUDAC, then HUDAC would go out and ascertain whether the complaint was valid. If the complaint was valid, then the workmanship would be upgraded or made satisfactory....

The bottom line is that the remedial work will be completed satisfactorily according to the original inspection report of the deficiency.

It should be noted that Mr. Drea's comment that it was the association's desire to get the inspection reports "all at the same time", is incorrect as this was the Ministry's decision.

In response to the complainant's persistent inquiries as to the progress of the matter, the Acting Executive Director, Business Practices Division, wrote to him on July 8, 1980 and stated as follows:

... As indicated to you by Mr. B, it appears that progress is still being made. With respect to your request for a letter to each homeowner, it is my hope that at the end of the negotiation it will be possible to provide each homeowner with a letter outlining at the very least those items which will be attended to. I trust you will find this to your satisfaction.

We will contact you as soon as we have a solid basis for meeting. [Emphasis added]

The homeowners appeared alarmed by this reference to "negotiation". In another letter to Mr. Drea on July 14, 1980, the complainant pointed out some of the recent comments made by Mr. Drea and Mr. A on June 12, 1980 before the Standing Committee on Administration of Justice, and particularly noted that it was stated that the builder was waiting for "the word" from HUDAC on the work required to bring the homes in question up to the HUDAC standards, and that the work would be done before the winter. The complainant added:

Paragraph 2 of a letter from [the Acting Executive Director] dated July 8, 1980 (copy enclosed) puts the whole process into confusion and doubt. What is being negotiated? Is it a dispute over what is deficient and whether or not certain items are covered by the HUDAC warranty? What is the time frame of this negotiation? We request for clarifications....

To date, they [homeowners] haven't heard a thing. They feel disillusioned. They feel desperate. To discuss all these substantive questions, on July 3 we wrote requesting for an opportunity to meet with you. Would you give us this opportunity?

This correspondence suggests that there was a negotiation process ongoing, but that the homeowners did not clearly understand what was being negotiated. They had been led to believe from Mr. Drea's statements and certain press reports that there was a commitment from HUDAC to have the homes repaired regardless of the builder's involvement. The press reports had also made it clear, however, that the builder had expressed a willingness to do whatever HUDAC required it to do. There is also some evidence in the Ministry's file on this matter that indicates that the word "negotiations" was mentioned at different times to the homeowners, but it would not appear that it was ever put to the homeowners that their recovery was entirely dependent on the builder's goodwill, and that it was with his goodwill that the process was continuing. This appears to be a position that evolved when the Ministry realized it did not have the commitment from HUDAC that it thought it had. The Ministry did not take the opportunity raised in the complainant's correspondence to inform the homeowners at this time that this was its position.

The press and Mrs. Margaret Campbell, MPP, had become involved in the increasingly anxious situation between the homeowners and the Ministry. On July 26, 1980, the first of three articles (later referred to as a "spate of publicity" by Ministry officials) appeared in a local newspaper entitled "Owners assured home repairs will be made". The article indicated that the homeowners were afraid that Mr. Drea might be backing away from his commitment, but Mr. B of the Ministry assured the reporter that the repairs would be started as soon as the report from HUDAC was received. Mr. B is quoted as saying:

It may be next week or next month. I can't say but it will be done this year. There is no reason to believe that seasons will be advancing on them [homeowners] and that the weather will be a problem.

Mrs. Campbell is quoted in the article as saying that she sympathized with the homeowners who "feel they are sitting outside the negotiations without any information". Mr. McClellan is quoted as saying that there might be a communication problem between the owners and the Ministry, but that he felt that there was no reason to believe there was any bad faith on the part of the Ministry. The builder's name is not mentioned in this article.

On July 18, 1980, Mrs. Campbell had written to Mr. Drea indicating that she had been trying, on a daily basis, to reach him to discuss the homeowners' desire to meet with him. She stated in her letter that the homeowners had at no time requested that all the reports be sent out at once, and that the homeowners had asked that the inspection reports be given to each of those who had filed complaints. Mrs. Campbell stated that she felt this should have been a minimum requirement. She further stated:

They understand that there are negotiations; Mr. B advised me of that. On the other hand, Mr. A says that the builder is ready to sit down and hear the news. What is happening is that they have no assurance at all of what the inspectors have reported, and therefore, what you are requiring the builders to do.

It does seem to me that in view of the commitment to these people, the minimum requirement is that they know what the inspectors found. There is no point in them getting a letter at the end of the negotiations saying what you have settled for. I don't seem to be able to make anyone in your Ministry understand that position.

Mr. Drea responded to Mrs. Campbell by letter dated August 1, 1983 and indicated that:

The Association and all the media with whom they have been in contact have been advised that the process is going ahead and that we anticipate that an announcement can be made in the near future.... The reports being prepared by the New Home Warranty Program have not yet been received by us and I can assure you that we have no interest in this matter other than to see that such major deficiencies as may exist are rectified in good and workmanlike manner. [Emphasis added]

This would appear to be the first time, in writing, that Mr. Drea suggested that the repair program covered major deficiencies only.

On August 4, 1980 an article entitled "Repair plan not enough for long-suffering homeowners" appeared in another local newspaper. The article indicated that although the homeowners "have the word of the Ontario government that defects built into their homes will be repaired before winter comes", the types of repairs to be performed as indicated by Mr. A and Mr. C of HUDAC to the reporter are, according to the complainant, "a giveaway to the builder and a betrayal of promises made to the association". The article said that the complainant learned only that month from the reporter that "the only deficiencies to be repaired will be those that have already caused identifiable problems". The article further stated:

Mr. A and Mr. C, general manager of the warranty program, confirmed in separate interviews that complaints about cosmetic defects will not be dealt with, nor will repairs be made to structural defects that have not resulted in problems--even if the failures are due to shoddy workmanship or to violations of the Ontario Building Code.

This was the first indication the homeowners had that the repairs would be limited in this manner. The article also pointed out that the homeowners were dissatisfied with the fact that they would only learn what repairs had been agreed to and not what defects were judged to be outside the warranty scheme. Mr. A was quoted as saying that the entire process was being conducted in good faith, and that the June 1, 1980 deadline was an "honest error" by Mr. C. "The inspections were to only take 12 weeks and instead, they've been 16 or 20. What's the big deal? It's a non-issue, not a cause for great alarm.... But their worries are the result of eight years of frustration rather than the realities of the last few months." The article did mention the name of the builder and some of the other projects the builder was involved in.

On August 15, 1980, the last of the three articles written during the summer of 1980 appeared in a local newspaper entitled "Defects report to homeowners within a week". This article, which was printed a little more than three weeks before the builder's offer of September 8, 1980, gave a positive account of the ongoing negotiations with the builder. Mr. C was quoted as saying that the engineering reports on the defects had been completed and that the homeowners would know within a week what repairs would be done. He is quoted as saying: "I don't think the builder has any objections to repairing legitimate items that are defective." The article then stated "But he [Mr. C] said many of the complaints have nothing to do with the original construction of the houses and have come from people who aren't the original owners. 'If you bought a car from General Motors and, eight years later, the engine conked out, maybe GM would do something for you but probably not,' [Mr. C] said." Mr. Drea was then quoted as saying "I said the houses would be fixed up and they will be fixed up, I'm the first guy who's ever done anything on it." Mr. A was quoted as saying that he was worried about the effect of the continued publicity on the houses' resale value.

This article is instructive for three reasons:

1. The comments of Mr. C, the only person negotiating with the builder, suggest that he was sympathetic with the builder's view that non-original owners of the homes should not be compensated;
2. Mr. Drea had reaffirmed his commitment;

2. Mr. A's stated concern about the effect of the publicity was on the resale value of the houses and not on the effect the publicity might have on the builder's assistance in effecting the repairs.

As part of the publicity during the summer of 1980, Mr. B had appeared on a radio show to answer questions on the homeowners' situation.

On August 18, 1980, Ministry officials met with some of the members of the Homeowners' Association, and in attendance were representatives from local newspapers. From the Ministry's and Homeowners' Association's notes on what transpired at the meeting, it seems that the focus of the meeting was the homeowners' concerns about the types of deficiencies which would be covered by the repair program-- the Ministry officials stating that it was only those causing identifiable problems, and the homeowners arguing that Mr. Drea had promised more than this. The Ministry promised that each homeowner would be given a letter which would contain a reference to both those matters complained of which would be corrected and those matters adjudged to be either cosmetic or caused by lack of maintenance. The homeowners were told they could expect this notification "within a couple of weeks" and that the repairs would be completed before the winter of 1980.

This meeting was thus a fairly positive acknowledgement that the repair program was about to be initiated, although the important issue of the types of repairs was becoming increasingly strained. The Ministry did not appear to have taken this opportunity to explain to the homeowners that any repairs were entirely dependent on the builder's agreeing to effect these repairs and that, should the builder not agree, no repair program would be forthcoming. The Ministry had no reason to tell the homeowners this because it felt things were progressing nicely with the builder, and the Ministry had not really crystallized its position at this point.

Meanwhile, Mrs. Campbell, MPP, continued to write letters to Mr. Drea and the Ministry officials on behalf of the homeowners, pointing out the apparent inconsistencies in the positions of the Minister and his officials and urging the Ministry to supply the homeowners with the results of the inspections. For example, on August 25, 1980, she wrote as follows:

What is the mystery about the HUDAC Inspection Reports? Have they been done? If they've been done, why haven't they been sent to the homeowners? Why are the positions of you and Mr. A at variance, and why does Mr. A's opinion and statement prevail? I would like straight answers to those straight questions!

On September 5, 1980, Mrs. Campbell wrote again to Mr. Drea, pointing out that Mr. Drea had promised in the Legislature that "the deficiencies will be remedied whatever the deficiencies are," and that Mr. A was quoted in a newspaper article on August 4, 1980 as saying that complaints about cosmetic defects would not be dealt with nor would repairs be made to structural defects that had not resulted in problems. She stated:

As you will readily see, the two statements are not compatible. You made no exceptions. Mr. A is waffling around with exceptions. The people have tried desperately to reach you and you have denied them a meeting with you to clarify the situation. The Inspectors Reports have not yet been made available although we understood that they were to be available to the owners. What is the problem?

On September 12, 1980, Mr. Drea wrote to Mrs. Campbell indicating that, to his knowledge, Mr. A had been handling the matter in a manner consistent with his views. Mr. Drea further stated:

At the appropriate time each homeowner will receive a letter which will indicate both the matters of which they have complained as well as the corrective work intended.

In the meantime, HUDAC had forwarded the completed inspection reports to the solicitor for the builder. On September 8, 1980, the solicitor for the builder forwarded to HUDAC the builder's offer to repair the homes. It was noted by the builder's solicitor that "the majority of the complaints relate to minor items," but that the builder was concerned with the reports regarding roof leaks and foundation leaks. The builder agreed to provide assistance to original homeowners who were then experiencing problems with the roofs and foundations, but not to resale buyers. This position was not surprising based on Mr. C's earlier comments to the press. The builder, however, was only prepared to pay 80% of the cost of the repairs, which was something unexpected.

The Ministry was not pleased with this offer, as was indicated in Mr. A's letter of October 7, 1980 to Mr. C, wherein he stated as follows:

It appears at this stage that there is a shortfall in coverage under this particular proposal over the coverage that was understood back when this program was undertaken by yourself and Mr. D [Chairman of HUDAC] in discussions with Mr. Drea and myself. The shortfall it seems clear, relates to an owner cost sharing now being proposed and the limitation of the program to first owners.

The Minister has advised the House on a couple of occasions on the basis of his understanding of your undertaking and must of course report back to the House with respect to those undertakings....

Mr. C then wrote back to Mr. A on October 29, 1980. His letter clearly highlights the misunderstanding between the Ministry and HUDAC. Mr. C stated:

There is, I am sure, some misunderstanding as to undertakings given by Mr. D and myself. There can be no doubt that Mr. Drea asked that the Program use its best efforts to sort out some problems being encountered by [the builder] or [the] homeowners. I agreed to do what we could believing that the complaints were of recent vintage and had probably been given directly to Mr. Drea.

As you know, it was only a short time later when it became obvious that the complaints Mr. Drea spoke of were 7-8 years old and numbered in excess of 140. It became clear to us at this stage that Mr. Drea was talking about one thing and we another. Despite this, we continued to do everything possible to facilitate the efforts of Mr. Drea to assist those homeowners with legitimate problems....

You indicate in your letter that the proposal by the builder appears to represent a shortfall in coverage over the coverage that was understood at the time of the original discussions. I am sure that this correctly reflects your understanding. However, the Program's understanding and commitment was that we would do everything we could to assist, and we have done that. The undertaking given by the builder may not be as extensive as some would like; but it, nevertheless, represents a substantial warranty and one that is not often provided by the producer of any product after a period of 7-8 years.

Not only does the letter highlight the misunderstandings, but it is clear that Mr. C, the only person who negotiated with the builder, was sympathetic with the builder's offer and considered it a good one.

The view of Mr. C is also evident from his comments to the Ministry when he forwarded copies of the inspection reports to it on October 29, 1980, as follows:

The inspections indicate that for the most part these homes were built in accordance with the building standards at the time of construction. Most of the problems mentioned by

homeowners while no doubt annoying, cannot be considered serious. The only problems which can be considered potentially serious are those relating to roofs and one or two foundations.

The "commitment" from HUDAC to which Mr. Drea referred on many occasions was obtained in a meeting attended by Mr. D, Mr. C, Mr. A and Mr. Drea. The meeting was held on February 20, 1979. The minutes of the meeting were not recorded in the Ministry's file, nor was any correspondence launched between HUDAC and the Ministry which might have confirmed the specifics of the commitment. My investigator was advised by Mr. A that the February 20, 1979 meeting had been scheduled to discuss HUDAC's budget requirements for the coming year. The discussion about the plight of the Homeowners' Association took place towards the conclusion of the meeting and was conducted very informally. Mr. A stated that Mr. Drea had mentioned his intention to assist members of the Homeowners' Association, and he asked Mr. D and Mr. C if he could count on their help. Apparently, the HUDAC officials gave their assurance that they would assist the Minister in any way that they could. There was no further correspondence or documentation with respect to this "commitment" until the letters above-noted.

Following receipt of the builder's offer, the Ministry officials met with the Homeowners' Association on September 15, 1980, but did not reveal the offer they had received from the builder, as they felt the offer was not sufficient. In the Temporary Ombudsman's letter of September 21, 1983, he stated as one of his possible conclusions that he felt that the offer should have been communicated to the homeowners. The justification given by the Ministry for not communicating the offer is set out in Mr. Crosbie's response of December 16, 1983, as follows:

It was an offer which we had been led to believe in no uncertain terms was not acceptable to the Homeowners' Association. Because of this the offer was not presented and as again indicated by correspondence which you have reproduced an attempt was made to obtain a fuller package. Ultimately the effort to obtain a fuller package was not successful.

There would appear to be no doubt that the homeowners would never have accepted the builder's proposal had it been presented to them at the time it was made, in the circumstances as they then were. This is clear from the newspaper articles, the correspondence, and conversations that members of our staff have had with the complainant. The reason the homeowners would not have accepted the proposal at that time was that they had been promised more by Mr. Drea and, to a lesser extent, by other Ministry officials. The homeowners did not place the primary responsibility for the repairs on the builder because the Ministry had indicated that the commitment was from HUDAC, and their understanding was that if the builder wasn't willing to go along then HUDAC or the Ministry would

step in. It may have been reasonable for the Ministry to keep silent about the offer at the September 15, 1980 meeting, as the Ministry genuinely hoped that the builder's offer could be improved. However, as we shall see, the reasonableness of the omission to communicate the offer can be questioned as the chances of an improved offer became increasingly slim and a deadline for acceptance of the original offer from the builder was established.

On November 4, 1980, Mr. Drea wrote to the Chairman of HUDAC, asking him to "personally examine the ramifications of the current situation" and to "intercede to get matters moving ahead quickly". The Chairman responded by letter dated November 13, 1980 stating as follows:

I have examined the Program's role in this endeavour, which we were pleased to undertake on your behalf. I must emphasize, however, that prior to becoming involved in a detailed examination of complaints, we were not aware of the magnitude of the complaint problem or of the several years interval between the construction of the homes and the discussions held with you. It was our understanding at the meeting that these were relatively minor complaints, and we stated only that we would be pleased to look into this matter for you.

Despite the facts that subsequently became apparent to us, our people worked hundreds of hours, expended substantial sums of money and achieved, through the builder, a settlement which appears to be eminently reasonable. I suspect that to further pursue the builder with respect to second or third purchasers of units several years old would likely produce nothing and leave more than a suggestion of unfairness.

This letter, once again, highlights the communication problems that existed between HUDAC and the Ministry as to the nature of the commitment and indicates the view of HUDAC that the builder had been more than reasonable in its offer.

Meanwhile, the homeowners' situation was again discussed at the Standing Committee on Administration of Justice on November 5, 1980. The principals in the discussion were Mrs. Campbell, Mr. A and Mr. Drea. This was a very extensive discussion tracing the history of the homeowners' problems, the commitment obtained from HUDAC, the types of repairs that were expected to be done, the problems with the inspection reports and the timetable for repairs. Mrs. Campbell started off the discussion by pointing out the apparent inconsistencies in the promises of Mr. Drea and Mr. A as to the types of repairs. Mr. A maintained that there were really no inconsistencies, and that the repairs that would be done would be those real problems that could be attributable to the original construction work of the builder. Mr. Drea made it clear that

the intention was, right from the beginning, that both original and subsequent homeowners would be covered by the repair program. Mr. A emphasized that his concern throughout had been to give the owners "a full and complete and straightforward report" that includes every item complained about by the homeowners, and a "straight, strict answer to each and everything, yes or no: 'It is your own problem'. 'It is a builder problem' or 'It is a maintenance problem.'" Mr. Drea then spoke about the commitment obtained from HUDAC, as follows:

The commitment that was reached was that the deficiencies would be repaired, because I wasn't going to get into legalisms with the industry represented by the Housing and Urban Development Association of Canada. I have never discussed this matter with [the builder]...

Since they have no legal power under terms of a registration or what have you to enforce this, the commitment was that if after the negotiations, which involved all of these inspections and finding out about the material, [the builder] maintained their original position that they had no legal responsibility under the home warranties program to do anything, the home warranties program would step in.... [Emphasis added]

We want that impasse broken or we are going to say the minister has a commitment from the HUDAC home warranties program that if this can't be resolved, it [HUDAC] will resolve it. How it deals with [the builder], I don't know ...

Who pays for it? Let them settle that afterwards. It won't be the homeowners.

Mrs. Campbell then raised the point about the missed deadlines for repairs to begin and Mr. Drea stated as follows:

Mrs. Campbell, let us speak about the deadline for a moment. We didn't want this thing to carry on to 1990 so that when somebody is going into a senior citizens' apartment there will be a little write-up that this is the last of the original ... home owners and nothing has been done.

As a final question Mrs. Campbell asked Mr. Drea when the matter would be terminated, noting that he had said in an earlier statement that it would be "very soon". Mr. Drea agreed that it would be very soon and referred to an upcoming meeting with the parties involved, saying that he would "hope to be in a position before the Legislature ends to give some relatively firm dates as to when the remedial work will be done". The Legislature was ending on December 12, 1980, and Mr. Drea made the following final commitment:

... certainly at least by December 12 there will be a full game plan so that everybody knows what is happening within the time frame.

The Legislature was dissolved on December 12, 1980 for the upcoming election in March of 1981. No "game plan" was revealed as to the program of repairs. Apparently, there was a meeting between HUDAC and Ministry officials on December 18, 1980 at which the HUDAC officials agreed to correspond with the builder to attempt to improve the builder's offer. On March 5, 1981, Mr. C wrote to the solicitors for the builder, pointing out that it was the Ministry's view that the builder's proposal did not go far enough, and asked if the builder would review his position with a view to improving his offer. Throughout this time the Homeowners' Association was unaware an offer existed.

On March 10, 1981, the solicitor for the builder responded in writing to Mr. C and made the following comments:

... Coincidentally just after receipt of your letter I had a telephone call from [a local newspaper] advising that there was going to be a march in front of the Honourable Frank Drea's home....

I was particularly impressed with the ... reporter who seemed to think that after these years the offer [the builder] already made was more than fair. I believe that reaction to be a reasonable one.

I should respectfully suggest that the matter be reviewed in light of all the circumstances. It seems quite coincidental that the agitation by the nine home owners should arise just at election time. May I say that we have not had any refusal communicated to us indicating that the home owners have refused our offer. It appears almost as if they wish to keep a number of strings in their bow at the same time. If the home owners do not accept our offer by the 25th March, 1981, I would have to advise my clients at that time the offer should be withdrawn.

As one can see, the solicitor for the builder was under the impression that the homeowners had received the original offer from the builder. In fact, the agitation referred to in the letter was being done in ignorance of the builder's offer. The agitation referred to was the picketing by some homeowners of Mr. Drea's and Mr. Davis' houses in March of 1981, because of the alleged inaction of the government. The focus of the picketing was not on the builder's inaction, but the government's inaction. There had been no publicity about the situation since the summer of 1980 when the three newspaper articles appeared, until an article appeared in another local newspaper on February 16, 1981

entitled, "Still waiting for Drea to act, homeowners say". This article focused entirely on the Ministry's inaction with respect to the homeowners' problems. The article noted that Mr. Drea had told a committee of the Legislature on November 5, 1980 that details of the repairs would be announced by December 12, 1980, which was not done. Another article appeared in a local newspaper on March 7, 1981 entitled, "Residents picket Drea home". Again, the article focused on Mr. Drea's unfulfilled promises. A third article appeared in the newspaper on March 9, 1981, and was entitled, "Studs pop, basements leak in \$250,000 homes". This article dealt with the problems in another subdivision built by the same builder and reference was made to the homeowners on several occasions.

The homeowners had also contacted our Office by this time, and in March of 1981 we informed the Ministry of our intention to investigate the homeowners' complaints.

There was a public meeting held on March 16, 1981 at which Ministry officials and the homeowners were present. Even at this late date the Ministry, although not very encouraging, did not dismiss the possibility that the matter would be satisfactorily resolved.

There was little progress made from this point forward. The deadline of March 25, 1981 for acceptance of the builder's offer was allowed to expire without notification to the homeowners, and the promised repair program was allowed to go unresolved. The homeowners have never been formally advised of the Ministry's final disposition of this matter, nor have they received the promised report on the outcome of the inspections of their houses.

Quite a number of months later, the entire matter was discussed before the Standing Committee on the Administration of Justice. The date was November 12, 1981. At this time there was a new Minister of Consumer and Commercial Relations, the Hon. Mr. Gordon Walker, who was in attendance along with Mr. A and other Committee members. Mr. Williams, MPP, defended the actions of the government and claimed that there was an "agreement between the developers and the home owners", but "... the home owners in this case had been their own worst enemies in taking the precipitous action they did in engaging in public demonstrations that had completely destroyed the benefits that had resulted from the negotiations, and from which the developer withdrew because of those circumstances.... These arrangements were torpedoed because of the most unfortunate action taken by the homeowners or their representatives at the time."

Following these remarks by Mr. Williams, Mr. Elston, MPP, defended the homeowners, stating that "they have a right to get a little bit itchy", and that he could not "blame them for participating in the public forum...."

Mr. A then gave his version as to why the matter could not be satisfactorily resolved:

Our problem really started last summer when we said, 'Things were going along. Be patient.' Things were not going that fast; I do not disagree with that. The inspections took longer than we would have liked. The resolution of the engineering things took longer than they probably should have. But it was going along not too badly. The builder was still in. Then we went through a real spate of media exposure in July, August and September of last year.... It was after that spate of publicity that he consulted his corporate counsel, who, I am sure, said: 'Mr. Builder, I have to advise you here you have no legal obligation. These homes are almost 10 years old. You have no legal obligation.' Things started to deteriorate from that point on.

Mr. Swart, another MPP, then asked the following question of the new Minister, Mr. Walker:

Surely what we are really discussing is a commitment by the former Minister of Consumer and Commercial Relations--an unequivocal, flat commitment--and this minister should give some indication of whether he is prepared to live up to that commitment, which was given unequivocally and many times.

Mr. Walker's response was as follows:

Come on. He thought he had a deal and I gather from what has been said the people went and blew it.

An article then appeared in another local newspaper on Thursday, November 26, 1981 entitled "Homeowners blamed for failure of firm to repair problem houses". The article pointed out that two Ontario Cabinet Ministers, Mr. Drea and Mr. Walker, claimed that the homeowners were the authors of their own misfortune. Mr. Drea is quoted as saying: "We moved heaven and earth to bring the builder back to his deal", but the homeowners "rocked the boat" with their protests and picketing. Mr. McClellan, MPP, is quoted in the article as saying that there was an unequivocal promise made by the government, and "if they're saying a demonstration in February, 1981, had something to do with it, that's laughable. By that time, the promises had all been washed down the sewer".

An investigator at our Office, contacted Mr. C of HUDAC following receipt by our Office of the Ministry's representations. Mr. C was questioned as to whether he felt that at any time a better offer could have been obtained from the builder, and what he felt was the effect of

the publicity. Mr. C indicated that there was "no way" that the builder was willing to satisfy all the deficiencies of the original and subsequent homeowners. He felt that the one offer was the best offer that could have been obtained and, in fact, was a good offer. He indicated that the builder knew right from the beginning that there was no legal obligation to do anything, and this was the basis on which Mr. C negotiated. His recollection of the effect of the publicity was that the March 25, 1981 deadline was put on the offer. He did not feel that the publicity prior to the offer from the builder had much effect. Mr. C did seem to have some difficulty, however, remembering the sequence of events.

When our investigator outlined the Ministry's view of the effect of the publicity and the fact that the builder "curtailed its offer", Mr. C did acknowledge that at the beginning the builder was very cooperative and agreed to do anything that HUDAC wanted, and that at some point the builder got "cheesed off", as did the builder's lawyers. Mr. C did not necessarily agree that the builder involved his lawyer as a result of the publicity, but felt that the builder relied heavily on his lawyers for advice as matters became more complicated. Mr. C reaffirmed his feeling that the offer that was received from the builder was a good offer, and when asked whether HUDAC would have required the builder to do any more he replied, "probably not". Mr. C's feelings about the builder's offer are clear from the earlier correspondence and newspaper reports cited above.

In summary, I would conclude that the evidence suggests that the Ministry understood it had a commitment from HUDAC as representatives of the building industry to assist the Ministry in instituting a repair program for the homeowners. The Ministry understood that HUDAC would be contacting the builder, whom the Ministry understood to be cooperative, although the extent of the repairs required was not yet known. The Ministry's understanding was that if HUDAC were not successful with the builder, then HUDAC or the industry would step in and fill the void. The essential promise was that the repairs were going to be done, and they were going to be done at no cost to the homeowners.

Through the course of events, particularly when the Ministry realized that it did not have the commitment from HUDAC that it had thought it had, the Ministry's position evolved into making its promised repair program conditional on what the builder was willing to do. The builder was not prepared to do everything that the Ministry had promised the homeowners would be done and, in the result, nothing was done. The publicity generated by the homeowners may have had some effect on the attitude of the builder, but there is little evidence to support the Ministry's claims that the publicity was the reason the entire matter "fell through". The sequence of events does not support this position. The only offer that was forthcoming from the builder was felt to be fair and reasonable by the party (HUDAC) which was charged with securing the

offer. If the publicity that occurred in the summer of 1980, which did not include any picketing or public demonstration, somehow affected the offer, the homeowners should not necessarily be blamed for this, as they had no clear appreciation of the process being undertaken, and they had not been included in the inspection process.

It would also be my view that once the Ministry's position had evolved to one of having the repair program entirely dependent upon the builder's willingness to effect repairs, the Ministry should have made this clear to the homeowners and given them the opportunity of accepting or rejecting the builder's offer. The Ministry would no doubt still have been criticized by the homeowners for changing its position, but at least it would not now be subject to the added criticism that it did not inform the homeowners of the builder's offer.

- B. ... based on a genuine concern for the situation of the home owners, the Ministry was prepared to intervene on their behalf in a situation where it lacked legislative jurisdiction ... we feel we have participated in a voluntary effort with the best of good will ... the agreement was clearly gratuitous on the part of both the Ministry and the New Home Warranty Program.... (Statements made in Mr. Crosbie's letter of December 16, 1983.)

The Ministry's position seems to be that because the intervention was gratuitous, it should not be held responsible for its failure to achieve a beneficial result, even if it could be criticized for the manner of its intervention. The homeowners maintain that the promises should not be viewed as entirely gratuitous. When the New Home Warranty Program was instituted in 1977, the homeowners made objections to HUDAC and the Ministry about the registration of the builder because of the builder's past misdeeds. HUDAC made the decision to register the builder based on its conduct at the time of application which was acceptable despite its past misdeeds, and the Ministry, when asked to review this decision, affirmed HUDAC's position. The homeowners argue that this would have been a perfect opportunity to force the builder, prior to allowing it to be registered, to deal with the homeowners' complaints. Mr. Drea alludes to this possibility in his statements made to the Legislature on December 13, 1978 as reported in Hansard, as follows:

Hon. Mr. Drea: I have the feeling that once somebody has paid their debt, the past shouldn't necessarily be held against them forever; except in this case [the builder] has never paid its debt.

Mr. McClellan: ... It seems to me it would have been legitimate at the time to say to [the builder] and its offspring: 'If you want to be registered under HUDAC, you settle up with these folks. You settle up with these folks you've ripped off, then we'll look at your application to register.' But that wasn't done.

Hon. Mr. Drea: Yes, obviously it wasn't done.

Following this exchange, Mr. Drea agreed to look into the matter. Mr. Drea is also quoted in Hansard on October 10, 1979 as follows:

Hon. Mr. Drea: As you know, the difficulty in [this] situation is they were built prior to the HUDAC home warranty program. I think it was always implicit that the homes should be repaired, although the argument laterally has not really been that. It has been on the question of why the principals of [the builder's] homes were registered under HUDAC at the time.... It was a judgment call. People were terrified of litigation. Okay. They are there. I have worked out an arrangement whereby all those homes will be repaired and I have communicated that....

Mr. Drea made the following statements before the Standing Committee on Administration of Justice on November 5, 1980, as reported in Hansard, when discussing how the Ministry originally got involved in the situation:

Hon. Mr. Drea: ... That request to me was, knowing at the time of the introduction of the HUDAC home warranties program that [the builder] was registered and allowed them to continue to build, notwithstanding what had happened in the particular subdivision ..., and realizing there is no legal responsibility for the home warranties program to be compelled to remedy the deficiencies in that subdivision, would I see what I could do? ...

Mrs. Campbell: You will agree there was some responsibility in not accepting for registration a firm with this kind of background.

Hon. Mr. Drea: Mrs. Campbell, that was a matter that had already been decided.... Our commitment was that since there was responsibility, forgetting legalism, we agreed on this point that we would proceed with orderly negotiations.

It would also seem that Mr. Drea, in making his promises to the homeowners, had a very genuine, personal concern for these people, having

actually inspected the homes several years before when he was Parliamentary Assistant to the then Minister of Consumer and Commercial Relations. Mr. Drea stated before the Standing Committee on the Administration of Justice on November 5, 1980: "I suppose I was biased, but I was sympathetic to them from the very beginning. I was very pleased that we reached the commitment that we did. I regard that as one of the better things I have been able to do as a minister. I want those houses fixed."

The Ministry is no doubt correct when it states that it had no legal responsibility to assist the homeowners, the homes having predated the Ontario New Home Warranties Plan Act which came into effect in 1977. There was, however, political pressure to assist the homeowners, and it would appear that the Minister also felt there was some moral responsibility to assist because of the registration of the builder under the New Home Warranties Program in 1977 despite the Ministry's knowledge of the homeowners' problems. Even without that extra element of responsibility, however, I have to conclude that as a result of the unequivocal and unqualified promises made to the homeowners, expectations were raised, and the Ministry must bear some responsibility for allowing the promises to go unfulfilled.

- C. While our continued involvement with this case may have created expectations that were beyond our capacity to fill, we are not aware of anyone who suffered a loss as a result of our activities. At worst they were in the same position as they would have been in had we not intervened. (Statements made in Mr. Crosbie's letter of December 16, 1983)

The issue raised is, of course, whether the homeowners have relied to their detriment on the Ministry's promises. The homeowners argue that they are in a worse position as a result of the promises of the Ministry for the following reasons:

- (a) The homeowners refrained from doing repairs in anticipation of government assistance. As a result, the defects in some cases have worsened, and the cost of repairs in some cases may now be greater.
- (b) Some homeowners refrained from selling their homes in 1981 when housing prices [locally] increased substantially, as they were waiting for the repairs to be completed prior to selling their homes, and they feel if they now sell their homes they would get less for them than what they could have received in 1981.
- (c) The homeowners have refrained, to their detriment, from pursuing other avenues of appeal and options for recovery.

There would appear to be some merit to the homeowners' contention in (a) above. With respect to their claim in (b), we have not investigated whether there would be a loss in resale value, as in my opinion such a loss would be too remote from the Ministry's actions in any event. With respect to contention (c), I would note that the homeowners had exhausted almost all other avenues of appeal before getting the commitment of the Ontario Government. However, it should also be noted that the builder is still a very large builder locally, and the homeowners have a reputation of being very tenacious in their pursuit of a remedy and could possibly have pursued this matter further.

However, my decision as to whether the homeowners' complaint is supportable is not dependent on a finding of detrimental reliance, but depends on a finding as to whether the Ministry has acted unreasonably.

Based on the foregoing, it is my opinion that the Ministry:

1. unreasonably omitted to document its commitment from HUDAC and confirm this commitment in writing with HUDAC;
2. unreasonably omitted to provide HUDAC administrators with the statement of the Ministry's expectations and its knowledge of the history of homeowners' problems;
3. unreasonably omitted to notify the homeowners of the builder's offer to repair the homes;
4. unreasonably omitted to provide the homeowners with the results of the HUDAC inspections as well as written notice of its final disposition of the matter.

[Reference: Ombudsman Act, section 22(1)(b)]

Prior to discussing my recommendations, I wish to comment on two other issues which are unrelated to the representations in Mr. Crosbie's written response to our Office of December 16, 1983.

The first point is that it is clear from my review of all documentation and statements made that it was the Ministry's intention to assist all homeowners who filed deficiency lists in 1980, whether these homeowners were original or resale buyers. Any recommendation that I might make to assist the homeowners must therefore include homeowners whether they be original or resale buyers, as long as they had filed deficiency lists in 1980 as requested by the Ministry.

The other matter that must be addressed is whether any recommendation I might make regarding assistance to the homeowners should include the repair of what are commonly referred to as "cosmetic defects"

as well as the more serious structural problems. The homeowners contend that the intention in the Ministry's promises was that all defects, whether cosmetic or structural, would be remedied.

The dichotomy between the two types of defects in homes seems to arise as a result of the types of warranties under the Ontario New Home Warranties Plan Act. Under the one-year-warranty program, the builder warrants that the homes are constructed in a good and workmanlike manner; are free from defects in material; are fit for habitation; and are constructed in accordance with the Ontario Building Code. Any defects as a result of poor workmanship or materials are covered under the one-year warranty, other than defects as a result of normal wear and tear or normal shrinkage of materials caused by drying. These are generally what are considered "cosmetic defects". Under the five-year warranty, only damage that has been caused as a result of any major structural defect would be compensated within this period. "Major structural defect" is defined in the regulations to the Act and generally means the failure of the load-bearing portion of the building, or defects which materially affect the use of the building, such as cracks in basement walls, collapse or serious distortion of joints or roof structure. It should be emphasized that damage must be suffered from a structural defect before recovery is possible.

It would appear that in attempting to implement the repair program, the Ministry and HUDAC officials were primarily concerned with those defects which could be categorized as structural defects and only if these defects had resulted in identifiable damage. This is evident from Mr. A's comments throughout, as well as HUDAC's summary of the inspection reports. HUDAC did conclude, however, that "for the most part these homes were built in accordance with the building standards at the time of construction", and that "most of the problems mentioned by homeowners, while no doubt annoying, cannot be considered serious". HUDAC concluded that the "only problems which can be considered potentially serious are those relating to roofs and one or two foundations".

The homeowners, of course, point to Mr. Drea's comments when they argue that it was intended that all defects, whether substantial or insubstantial, would be covered. This was what the homeowners were complaining about when they talked about the dichotomy between Mr. Drea's promises and what the Ministry officials said would be done. From a review of Mr. Drea's statements, there is some evidence to support the homeowners' position. However, I cannot conclude that Mr. Drea, when making his promises to the homeowners, ever really put his mind to the distinction between the types of defects contemplated under the Act. I feel his statements must be viewed more as general assurances that the homes would be looked at by HUDAC, and that those defects that HUDAC determined should be repaired would be repaired. HUDAC, as noted, felt that only the major defects were worthy of concern.

It is now at least twelve years since these houses were built, and they have, no doubt, undergone deterioration due to normal wear and tear. It would be very difficult to determine, at this point, which defects relate to original construction. Accordingly, it is my conclusion, based on the foregoing, that it would be unreasonable to make any recommendation with respect to the repair of cosmetic defects. This decision is also influenced by the evidence that shows that these homes have increased substantially in value since their purchase in 1971 and 1972.

I would also like to note that out of the original 365 homeowners who petitioned the Legislature, 144 filed the required deficiency lists in 1980 and thus were eligible for the promised assistance. Since 1980, I am advised by the Homeowners' Association, the 144 homeowners have now been reduced to 24 homeowners who are still interested in some form of assistance from the government, and who were homeowners in August of 1979 when Mr. Drea originally made his promises. Many of the homeowners who had originally petitioned the Legislature and who filed deficiency lists have since sold their homes and moved out of the neighbourhood. The complainant, on behalf of the homeowners, has indicated that he feels that only those homeowners who have expressed an interest in still receiving some assistance from the government, and who were homeowners at the time the original promises were made, should be eligible for assistance and should be advised of the results of the inspection of their homes.

It is, therefore, my recommendation that:

1. (a) The Ministry reopen its file on the matter and take whatever steps are necessary to review the HUDAC and related inspection reports for those houses which are owned by persons who originally filed a deficiency list and who are still interested in some form of assistance from the Ministry. (It shall be the Homeowners' Association's responsibility to advise the Ministry of the names of these persons.)
- (b) Following this review, I recommend that the Ministry, at no cost to the homeowners, repair those homes which had suffered damage as a result of a major structural defect relating to original construction.
- (c) If any of the above-noted homeowners have repaired damage caused by major structural defects relating to original construction, then these homeowners should be compensated for their repair costs upon proof of payment.

[Reference: Ombudsman Act, section 22(3)(g)]

2. The Ministry should send reporting letters to those homeowners who are still interested (as indicated to the Ministry by the Homeowners' Association), and who originally filed deficiency lists. The letters should indicate the matters about which the homeowners complained as well as the corrective work intended.

[Reference: Ombudsman Act, section 22(3)(b) and (f)]

My report was sent to the Ministry on August 1, 1984. Following the issuance of this report, the Ministry contacted my Office for clarification on two counts. The first was whether the Ministry could assume that the number of homeowners who were still interested in some form of assistance was limited to 24 persons. The Ministry was advised by letters dated October 15 and October 23, 1984 from my Office that the number 24 was an estimate and in fact the complainant had recently provided the Ministry with a list of 26 homeowners who still expressed some interest in the matter. I advised that although the latter number of homeowners might give an indication of the extent of the coverage the Ministry might have to consider, it was my recommendation that if other homeowners not on that list of 26 homeowners came forward and requested assistance and were otherwise qualified, they too should be eligible for compensation.

The second point raised was the meaning of "major structural defect" in my recommendations. It was acknowledged by Ministry officials that when the HUDAC inspectors were reviewing the defects in the homes, they were not necessarily considering only those defects which could legally be called "major structural defects" under the Ontario New Home Warranties Plan Act, but were also considering and noting those defects which could be considered "substantial defects" as opposed to minor defects or annoyances, and that it had been the position of both HUDAC and the Ministry that those homeowners suffering substantial defects should be eligible for recovery. This had been my intention when making my recommendations and for the purpose of certainty, I advised the Ministry in a letter dated October 15, 1984 that my recommendations would be amended as follows:

It is, therefore, the Ombudsman's recommendation that:

1. (a) The Ministry reopen its file on the matter and take whatever steps are necessary to review the HUDAC and related inspection reports for those houses which are owned by persons who originally filed a deficiency list and who are still interested in some form of assistance from the Ministry. (It shall be the Homeowners' Association's responsibility to advise the Ministry of the names of these persons.)

(b) Following this review, I recommend that the Ministry, at no cost to the homeowners, repair those homes which had suffered damage as a result of a major structural defect relating to original construction or in which there exist substantial defects relating to original construction as reflected in the HUDAC inspection reports.

(c) If any of the above-noted homeowners have repaired damage caused by major structural defects relating to original construction, or any substantial defects relating to original construction, as reflected in the HUDAC reports, then these homeowners should be compensated for their repair costs upon proof of payment.

[Reference: Ombudsman Act, section 22(3)(g)]

2. The Ministry should send reporting letters to those homeowners who are still interested (as indicated to the Ministry by the Homeowners' Association), and who originally filed deficiency lists. The letters should indicate the matters about which the homeowners complained as well as the corrective work intended.

[Reference: Ombudsman Act, section 22(3)(b) and (f)]

I received written representations from the Deputy Minister, Mr. Crosbie, on January 5, 1985. He advised that his Ministry was not prepared to implement my recommendations. On February 12, 1985, I wrote to him commenting further on his representations and advising him that a copy of my report and his letter of January 5, 1985 were being sent to the Premier pursuant to section 22(4) and (5) of the Ombudsman Act.

DETAILED SUMMARY NO. 2

The complainant registered his complaints against the Ministry of Community and Social Services and the Social Assistance Review Board in September, 1983. He contended that the decisions of the Director of Income Maintenance and subsequently the Social Assistance Review Board to cancel his Family Benefits on the grounds that he was no longer considered to be a permanently unemployable person, were unreasonable.

On October 6, 1983 the Deputy Minister of Community and Social Services and the Chairman of the Social Assistance Review Board were advised of the Ombudsman's intention to investigate the complainant's concerns. They were also invited to provide this Office with a statement of their organizations' positions with respect thereto.

On October 17, 1983 we received a response from the Chairman indicating that he had reviewed the complainant's file and had found that on the basis of the evidence before the Board, the members were correct in affirming the decision of the Director of Income Maintenance to cancel the complainant's assistance. Furthermore, following a reconsideration hearing by the Board on May 19, 1983, the Board had, in the Chairman's view, appropriately affirmed its original decision. No response was received from the Deputy Minister.

During the course of our investigation, the files of the Ministry's Income Maintenance Branch and the Social Assistance Review Board were reviewed in detail. In addition, interviews were conducted with the complainant; the complainant's former field worker, Mr. A; the Ministry's Family Benefits Supervisor, Ms. B; the local Welfare Administrator, Mr. C; the Ministry's Family Benefits General Manager, Mr. D, and the Ministry's Overpayments Records Clerk; and the complainant's physician, Dr. E.

Our review of the complainant's Family Benefits file revealed that based on the information which was before the Director of Income Maintenance and the Social Assistance Review Board at both of its hearings, none of their respective decisions could be considered unreasonable. However, after conducting a careful review of all of the evidence pertaining to the complainant's concerns, I wrote to the Deputy Minister of Community and Social Services on June 7, 1984 and in accordance with section 19(3) of the Ombudsman Act advised him of the information which had been gathered during the course of our investigation, including the following facts:

The complainant began receiving Family Benefits in 1970 as a permanently unemployable person. His medical eligibility was reviewed several times in later years including 1972, 1974, 1977, and February, 1982. All of these reviews confirmed that the complainant was considered to be permanently unemployable.

In March, 1982, Mr. A became the complainant's field worker. Mr. A has advised this Office that he became concerned about the complainant's eligibility for Family Benefits on medical grounds because he had seen the complainant performing body work on a number of cars parked on his property. He advised that he had seen him carrying a tool box, lifting tires, and bending under the hood of a car. Mr. A indicated that he was concerned that if the complainant could do all of these things, then he was capable of obtaining full-time employment. Secondly, since the complainant seemed to be working on other people's cars, Mr. A was concerned that the complainant could have been receiving undeclared income.

On July 16, 1982, Mr. A met with the complainant at his home following which he completed a Special Report for the Medical Advisory Board, stating that in his opinion the complainant was employable.

On July 19, 1982, Mr. A received a completed Medical Form 4 from the complainant's physician, Dr. E, which indicated that the complainant was permanently unemployable for medical reasons. According to Mr. A, he met with Dr. E on the same day and Dr. E advised him that the complainant was in his opinion, a malingerer. Mr. A wrote a memorandum on his conversation with Dr. E and sent it along with a Field Worker's Special Report and the Medical Form 4 to the Medical Advisory Board on August 20, 1982.

The Medical Advisory Board received this information from Mr. A on October 8, 1982 and on the same day, issued a report to the Director of Income Maintenance that in its view, the complainant was not permanently unemployable. In a memo dated October 8, 1982 the Medical Advisory Board acknowledged the field worker's report of Dr. E's comments.

On December 1, 1982, the complainant did not receive his cheque from the Ministry, so he called the District Office to make inquiries. He has advised us that a worker told him that he was not going to get his cheque any more but refused to give an explanation. We determined that the complainant was not provided with notice that his allowance was to be terminated, as is required under section 13(1) and (3) of the Family Benefits Act. In addition, his inquiries at the District Office with respect to the reasons for the termination were unsuccessful. I note however, that in response to inquiries by my investigator, the Ministry has recently paid the complainant his entitlement for November, 1982.

The complainant filed an appeal with the Social Assistance Review Board on December 2, 1982. He requested a hearing regarding the termination and complained on the form that he had received no notice of the Ministry's decision to cancel his assistance. He also complained that he had received no notice of the cancellation and he requested interim assistance. The hearing was held on January 18, 1983 and we have confirmed that the Director's written submission of that same date was given to the complainant immediately before the hearing by a Board official. He received no prior indication of what the Director's submission would contain and therefore, had little opportunity to address the concerns expressed by the Director of Income Maintenance. A copy of the complainant's Appeal Form 1 was sent by the Review Board to the Director and then on to the District Office where the Director's submission was written.

This submission consisted of a history of the complainant's involvement with Family Benefits and stated that a review of his medical file was completed by the Medical Advisory Board which reported to the Director as follows:

The Medical Advisory Board reviewed a single 004 dated 19.7.82 and an 011 dated 16.7.82.

The gentleman is obese and stated to have gastric hyperacidity (- symptoms of pain in shoulders and back, etc. - have been extensively investigated for which no cause can be found).

Prognosis - fair - doctor weekly to correct medication - no recorded hospitalization.

Educational level not stated - or work history - however does housework, yard work, and body work on old cars - no disability noted - still drives 3/4 ton van and four cars. Board does not advise he is unemployable.

The submission stated that the Director had accepted the Medical Advisory Board's opinion and withheld the allowance for November, 1982 and cancelled it effective December, 1982. There was no reference in the Director's submission to the letters which are normally sent to a recipient providing the required notice that his assistance is to be terminated. No reference was made to the report of the field worker or the comments made by Dr. E, although it is clear from the Ministry's file that the Medical Advisory Board and the Director of Income Maintenance considered the field worker's memorandum of July 19, 1982 indicating that Dr. E felt that the complainant was malingering.

I carefully reviewed all of the medical evidence on file in addition to these most recent reports submitted by the field worker and it appeared to me that the medical information in the Medical Form 4 dated July 19, 1982, was essentially the same information which was already in the Ministry's file and reviewed frequently between 1972 and February, 1982. It was my view that in his submission to the Review Board, the Director of Income Maintenance withheld from the Board and the complainant relevant facts which he considered in making his decision (i.e. the field worker's report on his conversation with Dr. E).

On the basis of the foregoing, I tentatively concluded pursuant to section 22(1)(a) and (b) of the Ombudsman Act that:

1. The Review Board acted unreasonably in failing to consider the complainant's application for interim assistance.
2. The Review Board acted unreasonably in failing to consider that portion of the complainant's appeal relating to the lack of notice given regarding the termination of his assistance.

3. The Review Board's decision to proceed with the hearing, notwithstanding the fact that the complainant had just received the Director's submission a few moments prior to the hearing, was unreasonable.
4. The Director's failure to provide the complainant with written notice of his proposal to cancel his assistance together with his reasons therefor was an omission which appears to have been contrary to law - specifically, section 13(1) of the Family Benefits Act.
5. The Ministry's failure to provide the complainant with a reasonable opportunity to examine the Director's submission prior to the hearing was an unreasonable omission.
6. The Director of Income Maintenance acted unreasonably in failing to include in his submission to the Review Board all the relevant facts which were considered in making the decision to cancel the complainant's assistance.

I tentatively recommended pursuant to 22(3)(g) of the Ombudsman Act that:

1. The Review Board should take steps to ensure that all issues brought to the attention of the Board by an appellant on the Appeal Form 1 are addressed by the Board at the hearing.
2. The Director of Income Maintenance should take specific steps to ensure that his submissions to the Social Assistance Review Board are provided to all appellants at such a time and in such a manner that a reasonable opportunity is provided to them to understand the Director's decision and prepare for the hearing.
3. In cases where it appears that an appellant has not been provided with a reasonable opportunity to examine the Director's submission prior to the hearing, the Review Board should advise the appellant that he may request an adjournment until such time as he has had a reasonable opportunity to examine the Director's submission in order that an adequate hearing may be held.
4. Where the appellant requests an adjournment, the Review Board should discuss with the appellant his financial situation, advise him that he may apply for interim assistance under these circumstances and, if financial hardship is apparent, direct the Director to pay the appellant interim assistance until a decision is reached by the Board.
5. The Director of Income Maintenance should advise the complainant of all of the relevant considerations which were taken into account at

the time of the decision to terminate his assistance, particularly the information reported by the field worker concerning his observations of the complainant working and the statements obtained from his family physician.

6. The Director of Income Maintenance should take steps to ensure his submissions to the Review Board contain a complete and fair account of the facts considered by the Ministry in reaching the decision which is the subject of the appeal.

....

On June 7, 1984 I wrote to the Deputy Minister of Community and Social Services and the Chairman of the Social Assistance Review Board and in accordance with section 19(3) of the Ombudsman Act invited them to make representations with respect to these tentative conclusions and recommendations.

Before reaching a final conclusion on this case, I have carefully considered the representations made by the Chairman in his letter of June 18, 1984 and the Assistant Deputy Minister, Ministry of Community and Social Services, in his letter of July 24, 1984.

With respect to my first possible conclusion, I note that the Chairman has agreed that the Board failed to deal with the appellant's request for interim assistance. The Chairman has informed me that administrative changes have recently been made to ensure that in the future, applications for interim assistance will not be overlooked. In view of this response, it would appear that a formal recommendation by me is not necessary.

With regard to my second possible conclusion, I note that the Chairman has also agreed that in its decision, the Review Board should have commented on the Ministry's procedural error in not providing the complainant with the proper notice of intent to cancel. This was a matter that was brought to the attention of the Board by the complainant in his Appeal Form 1. The Chairman has stated however, that inasmuch as the appellant chose to proceed with the hearing on the substance of his eligibility, the Board addressed itself to that issue and rendered its decision on the basis of the evidence. The Chairman has not made reference to my first possible recommendation that the Review Board take steps to ensure that all issues brought to the attention of the Board by an appellant on an Appeal Form 1 are addressed by the Board at the hearing.

In dealing with my third possible conclusion regarding the Board's decision to proceed with the hearing even though the complainant had just received the Director's submission, I note that the Chairman has

advised me that under such circumstances it is the standard practice of the Board members to inform the appellant that he or she has the option of requesting that the hearing be rescheduled or adjourned for a short period to enable the appellant to study the submission. The Chairman spoke with the presiding member at the complainant's hearing and was assured that this is her normal practice; he stated that he had no reason to doubt that it was done in this case. It would appear that the complainant elected to proceed with the hearing and it is the Chairman's view that the Board should not now be faulted for having acceded to the complainant's request. I note that in response to my third possible recommendation on this matter the Chairman has advised that he proposes to remind members of the Board of the importance of recording that an adjournment was offered where the appellant indicates that he has not had adequate time to review the respondent's submission.

I note that the Chairman has rejected my fourth possible recommendation even though he has acknowledged that there have been instances where the Board has proceeded as I have recommended. I am not persuaded by the Chairman's representations on this issue as he has not demonstrated why payment of interim assistance should not be considered as a matter of routine in cases where an appellant who has shown financial hardship, has not been given reasonable opportunity to review the Director's submission, and thus prepare for the appeal. Although the costs of such a procedure may at first appear to be a matter of some concern, the Assistant Deputy Minister has advised me that it is only in exceptional cases that there is a delay in the delivery of the Director's submission. Thus, the financial implications would not appear to be significant.

With respect to my fourth possible conclusion, I note that the Ministry agrees that written notice required under the Family Benefits Act was not sent to the complainant due to an administrative error. We have been advised by the Assistant Deputy Minister that the complainant has now received the assistance to which he was entitled and Ministry officials have reviewed the matter with the appropriate staff involved and trust that similar situations will not occur in the future. The Assistant Deputy Minister expressed his sincere regret for any inconvenience caused to the complainant. I have accepted the Assistant Deputy Minister's statements in this regard and it would appear that in view of the Ministry's actions, no formal recommendation by me is necessary in this regard.

Concerning my fifth possible conclusion and my second possible recommendation concerning the Ministry unreasonably omitting to provide the complainant with a reasonable opportunity to examine the Director's submission, I note the Ministry's position that it is only in exceptional cases that a copy of the Director's submission to the Social Assistance Review Board is not provided to the appellant in a timely manner. We

have been advised that in the complainant's case the delay was primarily the result of the late completion of the medical summary by the Medical Advisory Board which is essential to completing the Director's submission to the Review Board. The Assistant Deputy Minister has advised my Office that it has anticipated that this problem will be addressed with the recent decentralization of the Medical Advisory Board. The Ministry appears to be of the view that no specific action by the Director of Income Maintenance is necessary to ensure that his submissions to the Review Board are provided in a timely manner.

It may well be that the new administrative procedures which have been developed as a result of the Ministry's decentralization will assist in reducing the number of delays of this kind. However, it is my opinion that although an appellant has the right to request an adjournment in cases where he or she has not received a copy of the Director's submission until immediately prior to a hearing, this is not a practical or reasonable alternative for an appellant because of the costs involved in a delay. It is my view that this is a problem which should be addressed by the Ministry as an appellant should not be penalized for a delay on the part of the Ministry which is well beyond the appellant's control.

Finally, with regard to my sixth possible conclusion concerning the Director's submission to the Social Assistance Review Board, I note the Ministry's position that all the relevant facts were presented in a fair manner in the Director's submission to the Review Board. The Assistant Deputy Minister has advised me that in his opinion it was not appropriate to disclose Dr. E's comments to the field worker that in his view, the complainant was malingering as the Ministry considered this to be confidential information provided by a third party. The Ministry felt that if released, this information might prove detrimental to the third party and in addition the Ministry had no authority to release such information. The Assistant Deputy Minister rejected my sixth possible recommendation that the complainant be advised of all of the relevant considerations which were taken into account at the time of the decision to terminate his assistance.

I do not accept the Assistant Deputy Minister's position that the complainant ought not to be advised of the information provided by the Ministry field worker to the Medical Advisory Board concerning Dr. E's statement. The field worker's report clearly influenced the recommendation of the Medical Advisory Board and the decision of the Director of Income Maintenance to cancel the complainant's assistance. It is my opinion that in all cases, applicants and recipients should be provided with a fair account of the evidence which was considered by the Director in reaching his decision. Although there may be occasions when in the interests of the client, applicant/recipient certain medical information ought not to be released for good and proper medical or other reasons, this does not appear to be one of those cases.

I also do not agree with the Assistant Deputy Minister that the Ministry has no authority to release medical information on file to an applicant/recipient and it is my understanding that the Family Benefits Act contains no confidentiality requirements in this regard. I am in agreement with the Honourable Mr. Justice Krever who stated in his Report of the Commission of Inquiry into the Confidentiality of Health Information that "there is a discernable trend toward an individual's right of access to personal information about himself or herself including his or her own health information". I note that Mr. Justice Krever has taken the position in his Report that individuals should have a right of access to his or her medical records maintained by health care providers. I note that since 1981 the Workers' Compensation Board has provided all claimants with access to the medical information contained in the Board's files.

I also note that in the recent case of Re Stumbillich et al. and Health Disciplines Board et al. 44 O.R. (2d) 196, the Divisional Court held that the Health Disciplines Board must comply with the duty to act fairly and give the complainant access to the documents before the Board which were the basis for the decision to be reviewed. Mr. Justice Osler, speaking for the court stated at page 204 that: "There is little point in looking to the parties for representations which will help the board in reaching its conclusion if the parties do not have available to them the documents before the Board on which the conclusion being reviewed had been reached." The Divisional Court's decision was recently upheld by the Court of Appeal. In an oral judgment, Thorson, J. A. stated in part as follows:

It was thus incumbent upon the Board ... to provide the complainant with access to the documents in question in order that she might be in a position to ask any questions about them that she considered ought to be asked, respond to any statements or explanations made by either the respondent or the College's representative, and reply to any questions that either of them might see fit to put to her. Without such access, and thus lacking any direct knowledge of what the documents might contain or show, it is difficult to imagine how the complainant could be expected to prepare herself to do any of these things. Accordingly, in our opinion fairness required that the documents be made accessible to her.

Furthermore, in earlier the case of Re Downing and Graydon et al. (1978), 21 O.R. (2d) 292, it was held by the court that the requirements of natural justice and, in particular, the audi alteram partem rule, must be complied with, and the investigating officers were required to disclose to the complainant any information on which the officers' ultimate decision was based, particularly if it was adverse to the complainant. This case involved an investigation of a complaint under the Employment Standards Act.

Although there may be factual differences between these cases and the circumstances involved in Family Benefits applications, it is my view that the rules of fairness as outlined in these cases merit serious consideration in the context of the procedures used by the Ministry of Community and Social Services in advising applicants/recipients of the original decisions of the Director of Income Maintenance and in preparing submissions to the Social Assistance Review Board. In my opinion, it is incumbent upon the Director of Income Maintenance to fully advise applicants/recipients of the information which was considered by the Director in reaching his decision as well as to provide the Review Board with a fair account of this same evidence.

In accordance with the the provisions of sections 19(3) of the Ombudsman Act, I wrote to the complainant's physician, Dr. E on September 10, 1984 and advised him that in order to make a complete report on the results of my investigation of the complaints, it appeared to be necessary that I refer in my report to the field worker's written report that Dr. E had stated that the complainant was malingering. In view of the possibility that such a report might adversely affect Dr. E, I invited his representations. On October 1, 1984 I received a letter from Dr. E advising that although he had no objection to my including this information in my report, he would like to make it clear that the field worker misquoted him and "grievously erred in stating that I had said that the complainant was malingering.... Such a statement would be unfair, untrue and unjust in the circumstances". Dr. E advised me that he had reported to the field worker that although the complainant does not have an easily defined illness, he has repeatedly and earnestly stated that he is unable to work and Dr. E has no reason to disbelieve him. I have taken careful note of all of Dr. E's representations.

After considering all of the representations made by the Deputy Minister and the Chairman of the Social Assistance Review Board, I have determined pursuant to section 22(1)(a) and (b) of the Ombudsman Act that:

1. The Social Assistance Review Board acted unreasonably in failing to consider the complainant's application for interim assistance.
2. The Social Assistance Review Board acted unreasonably in failing to consider that portion of the complainant's appeal relating to the lack of notice given regarding the termination of his assistance.
3. The Social Assistance Review Board's decision to proceed with the hearing, notwithstanding the fact that the complainant had just received the Director's submission a few moments prior to the hearing, was unreasonable.
4. The Director's failure to provide the complainant with written notice of his proposal to cancel his assistance together with his

reasons therefor was an omission which appears to have been contrary to law - specifically, section 13(1) of the Family Benefits Act.

5. The Ministry's failure to provide the complainant with a reasonable opportunity to examine the Director's submission prior to the hearing was an unreasonable omission.
6. The Director of Income Maintenance acted unreasonably in failing to include in his submission to the Social Assistance Review Board all the relevant facts which were considered in making the decision to cancel the complainant's assistance.

I also recommend pursuant to section 22(3)(g) of the Ombudsman Act that:

1. The Director of Income Maintenance should take specific steps to ensure that his submissions to the Social Assistance Review Board are provided to all appellants at such a time and in such a manner that a reasonable opportunity is provided to them to understand the Director's decision and prepare for the hearing.

In this regard, I recommend in light of the Assistant Deputy Minister's most recent representations that the Ministry monitor this aspect of the appeal process by recording the dates on which the Director's submissions are sent to appellants over the next six months indicating the reasons for any delays which occur, and advise me in six months of the results.

2. In cases where it appears that an appellant has not been provided with a reasonable opportunity to examine the Director's submission prior to the hearing, the Review Board should advise the appellant that he has the right to request an adjournment and apply for interim assistance to be paid until such time as he has had a reasonable opportunity to examine the Director's submission in order that a proper hearing may be held.
3. Where the appellant requests an adjournment on these grounds, the Review Board should discuss it with the appellant and explain to him that the criterion for interim assistance eligibility is demonstrated financial hardship. If financial hardship is apparent, the Review Board should direct the Director to pay the appellant interim assistance until a decision is reached by the Board.
4. The Director of Income Maintenance should advise the complainant of all of the relevant considerations which were taken into account at the time of the decision to terminate his assistance, particularly the information reported by the field worker concerning his observations of the complainant working and the statements obtained from his family physician.

5. The Director of Income Maintenance should take steps to ensure his submissions to the Social Assistance Review Board contain a complete and fair account of the facts considered by the Ministry in reaching the decision which is the subject of the appeal.

Finally, in view of Dr. E's representations to this Office that he did not report to the field worker that the complainant was a malingerer, and since this information was a major factor in deciding to cancel the complainant's assistance, I strongly suggest that if the complainant reapplies for Family Benefits, his application be considered without regard to the field worker's report. I make this suggestion also in view of the fact that Ministry officials have advised my Office that Mr. A's performance as a field worker with the Ministry did not meet required standards and his employment at the district office ended sometime later.

My final conclusions and recommendations were reported to the Ministry and the Social Assistance Review Board on October 26, 1984.

I received personal and written representations from the Review Board on November 19, 1984 and January 2, 1985, respectively. Written representations were received from the Deputy Minister of Community and Social Services on January 10, 1985. On March 28, 1985, I wrote to the Ministry and the Review Board to advise them of the recommendations with respect to which I thought their responses were not adequate or appropriate.

I exercised my discretion under section 22(4) and (5) of the Ombudsman Act and referred the matter to the Premier on March 28, 1985. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 3

The complainant contacted our Office by letter dated September 16, 1982. He requested that the Ombudsman assist him in his efforts to obtain a complete investigation and hearing into the manner of his departure in 1979 from employment with the Investigations staff of the Liquor Licence Board of Ontario.

On October 15, 1982, the Ombudsman wrote to the Chairman of the Liquor Licence Board of Ontario and advised him of his intention, pursuant to section 19(1) of the Ombudsman Act, to investigate the complaint.

In his letter the Ombudsman outlined the complainant's contention that he had been improperly pressured into resigning from his position of inspector with the Liquor Licence Board of Ontario. The resignation came following a July 23, 1979 hearing before the Discipline Committee of the Liquor Licence Board of Ontario. At that meeting the issues discussed were the presence of minor mileage discrepancies in the reports submitted by the complainant, and in particular a statement of complaint allegedly signed by Mr. J, the licensee of a tavern regularly inspected by the complainant.

The complainant contended that the hearing was not fair or proper, as he had not been permitted to be represented by his own lawyer or to call witnesses. According to the complainant his lawyers had been advised by a member of the Board that Mr. J's statement was the main reason for the Board seeking his termination. However, the complainant pointed out that the Board had been in possession of the statement for almost ten months before it took action against him.

It was the complainant's belief that Mr. J had not filed a complaint against him, and in fact Mr. J had stated to him that he was pleased with the manner in which the complainant had carried out his duties as an inspector. The complainant alleged that the statement had been composed by two inspectors of the Board, Mr. B and the late Mr. C, and had been signed by Mr. J's wife out of fear of the two inspectors. In addition, the complainant said that he had been advised by Mr. C that Mr. B had later added a paragraph to the statements, under the signature.

The complainant also noted that the Board's estimates of his distances travelled were incorrect by as much as 100 per cent in some cases.

He pointed out that other employees under the same circumstances had received only a 90-day suspension.

In summary, the complainant contended that the Board had acted in an unfair and unreasonable manner, and that he had been made a scapegoat during an OPP probe into improper practices by Liquor Licence Board inspectors.

Mr. A, Director of Administration for the Board, responded to the Ombudsman's letter on November 12, 1982, and a copy of this letter was sent to the complainant for his comments. The file was assigned to a member of my investigative staff, and later reassigned to another member of my investigative staff.

The investigation of this complaint included interviews with present Liquor Licence Board personnel, including the individual who investigated the allegations against the complainant; union officials;

the solicitor for the union; the complainant's supervisors and co-workers; the complainant's solicitor, Mr. K; an Examiner of Questioned Documents; Mr. J; and the complainant. In addition, relevant Board files and the Ontario Manual of Administration were reviewed, as well as relevant legislation and other applicable law.

During the course of the investigation it became apparent that I could not support some aspects of the complainant's contentions. Mr. J confirmed to my investigator that the signature on his statement of complaint is his. A handwriting analysis of this signature by an Examiner of Questioned Documents, also indicates that the signature is genuine.

Mr. B's recollection regarding the added paragraph to Mr. J's complaint is that the paragraph was added in Mr. J's presence. Mr. C is deceased, and there is no evidence to support the complainant's contention that this paragraph was added to the statement when Mr. B returned to the Board office.

Finally, independent random tests carried out by my Office supported, on those routes checked, the Board's estimates of the complainant's mileage. I therefore cannot support the complainant's contentions regarding the Board's estimates of his distances travelled.

The investigation therefore focused on the circumstances surrounding the complainant's departure from his position with the Board. In this regard, I came to the following possible conclusions and possible recommendations, and so advised the Chairman in a letter dated May 7, 1984:

Possible Conclusions:

The actions of the Liquor Licence Board of Ontario were unreasonable in the matter of the complainant's departure from employment with the Board in that:

- 1) The complainant was pressured into resigning by the Board and was therefore in effect dismissed.
- 2) The Board's decision to dismiss the complainant was unreasonable as the allegations against him did not warrant such severe discipline under the circumstances.
- 3) The Board failed to follow fair procedures in arriving at its decision to dismiss the complainant, and further, that the Board did not properly follow its own policies with respect to disciplinary procedures.

[Reference: Ombudsman Act, section 22(1)(b)]

Possible Recommendations:

- 1) The Liquor Licence Board of Ontario should compensate the complainant by an amount equal to one full year's salary from which shall be subtracted the two months' salary already received as severance, the value realized by him when he purchased the Board vehicle at wholesale cost, and additionally, an amount equal to 90 days' salary in view of the remaining allegations against him concerning expenses and the manner in which he carried out his duties.
- 2) The Liquor Licence Board of Ontario should establish fair and reasonable disciplinary procedures in compliance with the Manual of Administration where they are not in place at present and such procedures should be strictly adhered to in future.

[Reference: Ombudsman Act, section 22(3)(d) and (g)]

I based my possible conclusions and recommendations on the following information.

The complainant had been hired by the Liquor Licence Board of Ontario as a Liquor Licence Inspector in 1972. His personnel file indicated that he was an acceptable employee and did not require formal discipline prior to the events which took place in 1979.

In October of 1978, two investigators for the Liquor Licence Board attended at the establishment of a licensee, Mr. J, and obtained a signed statement from him alleging that the complainant regularly ate at his restaurant and did not pay. Additionally, an investigation was conducted by these investigators on the activities of the complainant, and a fellow inspector, Mr. D. The report of the investigation regarding the complainant was quite lengthy and concerned a wide variety of subjects, including the complainant's expense claims and the manner in which he performed his duties. The signed statement by Mr. J was included in this report by the investigators.

On June 25, 1979, the complainant received a hand-delivered notice which required his presence on the following day at an investigative hearing into his activities as inspector. This notice did not mention Mr. J's statement. At the investigative hearing, it would appear that the complainant denied the majority of the allegations. Regarding the J statement, he agreed that he had eaten meals at Mr. J's restaurant without paying, stated that this was common practice at the time and that Mr. J would not accept money. On the same day, another investigative hearing was held concerning the activities of Mr. D. The allegations against him were essentially similar, with the exception of the statement by Mr. J against the complainant.

Following the investigative hearing, the Discipline Committee of the Board met and considered the results of that hearing. On July 6, 1979, the Discipline Committee decided to recommend to the Chairman that the complainant be dismissed for falsification of expense accounts, excessive inspection of premises closest to his residence, conducting spot inspections with another inspector without prior approval of the Board, and accepting benefits from a licensee. The Board met on July 23, 1979 and decided to dismiss the complainant based on the findings of the investigative hearing and the recommendations of the Discipline Committee. It would appear that the Board also decided that the complainant would be given the option of resigning. The complainant resigned on July 27, 1979 on the understanding that he would receive approximately two months' salary and would be allowed to purchase his automobile at wholesale value.

My investigation showed that immediately after the investigative hearing, the complainant retained the services of a lawyer, Mr. K. Mr. K made repeated attempts to have the allegations against the complainant examined at a full hearing which would include examination of witnesses. The Board refused Mr. K's request for a full hearing and it also did not advise him of the findings of the Discipline Committee outlining the specific reasons for its recommendation to dismiss. Mr. K was able to review the report of the Board investigation and he sent written submissions regarding this report to the Board prior to its final decision.

The complainant had alleged that Mr. A, Acting Chief of Inspections at the time, and Chairman of the Investigative Hearing, threatened that the information collected against the complainant would be turned over to the police if he did not resign. Some of the individuals present at the hearing stated to my investigator that they heard Mr. A make such a statement. Additionally, Mr. E, then Personnel Manager with the Board, had stated that he told the complainant that unless he resigned, the Board would submit its information to the police and criminal charges would probably result. I noted that at the time in question, a number of the Board employees including the Chief of Inspections, Mr. F, had been charged with accepting benefits.

I noted that the allegations against Mr. D were essentially similar to those against the complainant, with the exception of the statement by Mr. J. I noted further that the Board imposed discipline consisting of a 90-day suspension without pay in the case of Mr. D.

Representatives of the Board had advised my investigator that the Board's disciplinary procedures and policies at the time were based on voluntary compliance with the Ontario Manual of Administration. I noted that in a section entitled "Discipline" the manual requires that a hearing be held with at least 48 hours' notice to the employee. The

notice requirements in the Manual further stipulate that the employee be advised fully of the specifics of the allegations against him. Additionally, the Manual states that this hearing must afford the employee a full hearing, including the right to examine witnesses. In short, the Manual contemplates what appears to be a quasi-judicial hearing where the employee has an opportunity to present his side of the story. I noted that the notice given to the complainant did not meet with these requirements as it gave him only 24 hours' notice and did not advise him of the statement made by Mr. J. Further, I noted that the complainant was not provided with the kind of hearing contemplated by the Manual.

My investigation included interviews with numerous individuals who were employed by the Board at the time, as well as others in the food and beverage industry. I am informed that in October, 1978, when Mr. J made his statement, it was common practice for inspectors as well as more senior personnel of the Board to accept courtesy from licensees. Board personnel have also advised that memoranda are circulated periodically advising employees that this practice is a criminal offence and that it is contrary to Board policy.

I also took note that immediately prior to the period in question, the complainant's superiors, Mr. F and Mr. G, as well as four inspectors from Ottawa, had been criminally charged with, among other offences, accepting benefits.

I stated, based on the foregoing, that, while I would not conclude that some manner of discipline would have been unreasonable with respect to the allegations concerning improper inspection practices and improper reporting of expenses, such discipline should have been comparable to that imposed upon Mr. D for similar breaches.

I noted that while the complainant ostensibly resigned from his job, the evidence indicated that he was threatened with possible criminal prosecution by Mr. E and possibly by Mr. A. It appeared therefore that the complainant was pressured into resigning and, in effect, dismissed.

It also appeared to me that the Board's reasons for dismissing the complainant may have been inadequate. In view of the less severe discipline imposed upon Mr. D, it appeared that the statement made by Mr. J formed the basis for the Board's decision to dismiss the complainant. I noted that the Board was in possession of Mr. J's statement for approximately ten months prior to taking any action. The implication therefore arises that the Board condoned the activities of the complainant and indicated that it did not view the alleged activity seriously enough to take immediate action. Additionally, when acceptance of courtesy seems to have been a prevalent practice on the part of Liquor Licence Board personnel, severe discipline against one individual for

activities which were generally condoned at the time appeared to be unreasonable.

I concluded by reiterating that the Board failed to follow the procedures it had adopted as policy in dealing with disciplinary problems. The complainant received insufficient notice of the investigative hearing, and the hearing itself did not live up to the requirements of the Manual of Administration. I commented that regardless of the Board's internal policies, simple fairness would have required that the complainant should have received proper advance notice of the full allegations against him, and that he should have been provided with a full opportunity to present his position.

The Chairman of the Board responded on June 4, 1984.

In his letter he denied that the complainant was pressured to resign. He noted that the complainant had almost thirty days before the Board meeting on July 23, 1979 to complain to the Chairman. The complainant had been represented by the union at the June 26 hearing, and if there had been procedural unfairness or pressure, this would have been opposed by the union. Further, he said, Mr. A had been on vacation from June 29, 1979 to August 13, 1979.

The Chairman pointed out that in a July 5, 1979 letter to the then Chairman, the complainant's lawyer, Mr. K, did not complain that pressure to resign had been applied, nor did Mr. K mention this in his subsequent letters of July 9 and July 17, 1979. He noted that the matter did not come to the Board's attention until the Ombudsman's letter of intention to investigate in October, 1982.

The Chairman quoted from the collective agreement in force at the time and stated that no grievance had been filed, nor did the complainant's union representatives raise the matter of alleged lack of specifics in the notice or the conduct of the hearing.

The Chairman stated that as a result of the complainant's decision to resign, no decision to dismiss him was necessary and therefore the conclusion that the decision to dismiss was unreasonable was academic. He noted that in any event the recommendation of the members of the initial hearing had been reviewed by the Discipline Committee and by the Liquor Licence Board.

The Chairman also noted that the June 25, 1979 letter to the complainant specified the topics to be covered and advised him of his right to be represented.

The position of the Board to my first possible recommendation therefore was that the complainant had been treated fairly by the Board, and it would be inappropriate and without justification to compensate him.

Regarding my second recommendation, the Chairman said that the collective agreement spells out the procedures and rights of employees who are covered by the collective agreement, including the right to appeal to the Grievance Settlement Board. The Chairman stated that the collective agreement takes precedence over the Manual of Administration.

Finally, the Chairman stated that the complainant's allegation that it was common practice for inspectors to accept benefits constituted an unfair slander on the other one hundred inspectors who were then employed by the Board and who were not found guilty of this practice. Similarly, the Chairman considered the complainant's allegation that Mr. A and Mr. E pressured him into resigning also to be an unfair slander, stating that the complainant had ample opportunity to seek counsel from the union and from his own solicitor regarding his rights under the collective agreement and whether or not he should resign.

My comments on the Chairman's submissions are as follows.

At the time of these events, the complainant viewed the pressure being exerted upon him as a decision made at the Chairman's level and a planned attempt to force him to leave his employment quietly. He therefore felt that any appeal to the Chairman would be futile. It also appeared to the complainant that while the union would have advanced his case, it was not enthusiastic, and was in fact relieved that the complainant chose to resign rather than pursue a grievance. Although his solicitors were aware of the pressures being applied to the complainant, their objective at the time was to obtain a hearing of the matter before the Chairman. When no such hearing could be obtained, despite numerous attempts, the complainant's solicitors sent written submissions addressing the issues outlined in the investigative report. Finally, the complainant had been told that he would likely be criminally charged if he did not resign.

The procedural irregularities of the hearing are evident on the written record of this matter. Where it is found that an employee may have resigned under pressure, and where it appears that he does not have adequate notice for the only hearing where he appears personally, it can be argued that this lack of notice forms an integral part of an unfair and unreasonable process. The fact that no one objected at the time cannot be an acceptable answer where an important issue such as dismissal procedure is concerned.

Regarding the Chairman's statement that the Board did not make a decision to dismiss the complainant, as he had resigned, I would point out that the Board's own files indicate the contrary. I refer in particular to a July 25, 1979 memo from the then Chairman to Mr. E, wherein the then Chairman notes that the complainant's employment is to be terminated. In addition, in a July 26, 1979 letter from Mr. H, Assistant

General Manager of the Board, to the complainant's solicitors, it is noted that the decision of the Liquor Licence Board regarding the complainant is that he be dismissed.

The Board advised the complainant on July 25, 1979 that he was to be dismissed, but on July 26, 1979 provided him with the opportunity of resigning.

Although the notice of investigative hearing delivered to the complainant on June 25, 1979 advised him of his right to be represented, the complainant was given less than 24 hours' notice for this hearing. In my opinion, this constitutes insufficient time to obtain legal representation.

With reference to the Chairman's statement that the collective agreement takes precedence over the Manual of Administration, I would like to point out that the Manual of Administration deals with procedures prior to any decision with respect to disciplinary action, while the collective agreement addresses the procedures to be followed after the Board has arrived at such a decision. It would appear to be eminently reasonable that the Board attempt to air the issues prior to a final decision on its part in order to avail itself of every opportunity to avoid costly and lengthy grievance procedures under the collective agreement.

Finally, the Chairman contends that the complainant had slandered former fellow employees and other personnel of the Board by stating that the acceptance of courtesy was commonplace at the Board at the time in question. Our investigation, which included interviews with numerous inspectors and former inspectors, would indicate that acceptance of courtesy was in fact the norm at the time. Moreover, Mr. E himself stated to my investigator during an interview that he told the complainant that he would likely be criminally charged if he did not resign. Mr. A has denied the alleged threats of prosecution.

In an effort to resolve the matter, on November 14, 1984 I and members of my staff met with the Chairman, members of his staff and a union representative. We were informed at that meeting that in the matter of disciplinary procedures, the Board now strictly adheres to the procedures outlined in the Manual of Administration. I therefore consider this aspect of the complaint to be resolved. After considerable discussion of the main issue raised by the complainant - his entitlement to additional compensation - the Chairman agreed to review the complaint once again and advise me of his decision.

By letter dated December 5, 1984 the Chairman advised me that the position of the Board had not changed regarding compensation for the complainant, and that the Board did not therefore consider that he was entitled to any additional compensation.

It is my conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that the actions of the Liquor Licence Board of Ontario were unreasonable in the matter of the complainant's departure from employment with the Board in that:

- 1) The complainant was pressured into resigning by the Board and was therefore in effect dismissed.
- 2) The Board's decision to dismiss the complainant was unreasonable as the allegations against him did not warrant such severe discipline under the circumstances.
- 3) The Board failed to follow fair procedures in arriving at its decision to dismiss the complainant, and further, that the Board did not properly follow its own policies with respect to disciplinary procedures.

I therefore recommend, pursuant to section 22(3)(g) of the Ombudsman Act that the Liquor Licence Board of Ontario compensate the complainant by an amount equal to one full year's salary from which shall be subtracted the two months' salary already received as severance, the value realized by him when he purchased the Board's vehicle at wholesale cost, and an amount equal to 90 days' salary in view of the remaining allegations against him concerning expenses and the manner in which he carried out his duties. In calculating the amount owing, the complainant's pension income should also be taken into consideration.

An approximate calculation of the amount owing was presented to the Chairman at the meeting of November 14, 1984, as follows:

Annual salary as at July 4, 1979 = <u>\$20,026</u>		
12 months' compensation =	\$20,026	\$20,026
<u>Less:</u> 2 months' severance received =	\$ 3,336	\$16,690
<u>Less:</u> Value of Board vehicle purchased at wholesale price =	\$ 800	\$15,890
<u>Less:</u> 90 days' salary as penalty for remaining allegations =	\$ 5,004	\$10,886
<u>Less:</u> Pension payments received from August 1, 1979 to July 1, 1980 = \$184 per month x 12 months =	\$ 2,208	\$ 8,678
Total compensation due =		<u>\$ 8,678</u>

Interest calculation: pursuant to the Judicature Act, section 536

Recommended: Interest at the rate paid by chartered banks to their most credit-worthy customers in the month prior to the registration of the complaint with the Ombudsman (August, 1982).

Prime rate for this period (August, 1982) shall be determined according to the Bank of Canada Review.

Interest to be calculated from date of resignation.

Bank of Canada prime rate as at August 25, 1982 = 14.25%

<u>Total Interest due:</u>	\$ <u>6,558.66</u>	\$ <u>6,558.66</u>
TOTAL AMOUNT DUE		<u>\$15,236.66</u>

My report was sent to the Ministry and to the Liquor Licence Board on January 3, 1985.

On March 19, 1985, I received a response to my report from the Chairman of the Liquor Licence Board indicating that the Board continued to maintain that the complainant is not entitled to any additional compensation. Consequently, my report was forwarded to the Premier on March 21, 1985, pursuant to section 22(4) and (5) of the Ombudsman Act.

DETAILED SUMMARY NO. 4

This complaint against the Residential Tenancy Commission was formally made to my Office when the complainant's MPP wrote to our Office on November 1, 1983 on behalf of the complainant, who represented a group of tenants.

On November 15, 1983, the Temporary Ombudsman, in accordance with the requirements of the Ombudsman Act, wrote to advise the Chairman of the Residential Tenancy Commission of his intention to investigate the complaint concerning a decision of the Appeal Panel of the Residential Tenancy Commission that the sale of an apartment building was bona fide. In particular, the complainant and other tenants objected to the decision because, in their opinion, the onus of proving the bona fides of the sale of the apartment building was placed on the tenants instead of the landlord. Further, the complainant complained that the decision was wrong because there was insufficient information about the sale. A copy of our letter was also sent to the Deputy Minister of Consumer and Commercial Relations.

On December 1, 1983, the Senior Legal Counsel of the Residential Tenancy Commission responded on behalf of the Chairman. The Senior Legal Counsel stated that in his opinion, the findings and conclusions made by the Commission in this matter were supportable by the evidence and by the law in that the Commission had acted properly and reasonably.

During the course of this investigation, the file maintained by the Residential Tenancy Commission was examined in detail and photocopies of all relevant documents were made. The complainant and his co-complainants were interviewed and legal research was carried out with respect to the issues under review.

After conducting a careful review of all the material relating to the complaint, I wrote to the Chairman of the Residential Tenancy Commission on April 26, 1984 and, in accordance with section 19(3) of the Ombudsman Act, invited him to make representations with respect to the following possible conclusions and recommendation.

Possible Conclusions

- a) The decision of the Appeal Panel of the Residential Tenancy Commission that the sale was bona fide is unreasonable within the meaning of section 22(1)(b) of the Ombudsman Act;
- b) The decision of the Appeal Panel of the Residential Tenancy Commission is unreasonable within the meaning of section 22(1)(b) of the Ombudsman Act in that it required the tenants to bring forth conclusive evidence on the bona fides of the sales transaction when it should be the responsibility of the Residential Tenancy Commission to obtain the evidence given its power of inquiry under the Residential Tenancies Act.

Possible Recommendation

Pursuant to section 22(3)(g) of the Ombudsman Act the Appeal Panel of the Residential Tenancy Commission should reconsider its decision, and obtain further evidence from the landlord on the issue of the bona fides of the transaction between [Company A] and [Company B], and in particular, the identity of the beneficial owners of [Company C] and [Company A].

During the course of our investigation, the following information was revealed.

The complainant represents a group of tenants residing in an apartment building in a community in Ontario. In September, 1981, the building was purchased by Company B from Company A. On June 23, 1982, the complainant and the other tenants of the apartment building received notice that their landlord, Company B, was seeking a rent increase of 44%. The tenants sought information pertaining to the September, 1981 sale of the apartment building and discovered that there were some overlapping directorships between Company B, Company A and a third company, Company D, which manages the apartment building.

At a hearing before a Commissioner, the tenants offered this information as evidence that the September, 1981 sale was not at arm's length and, therefore, not bona fide. The Commissioner requested information from solicitors representing the vendor and purchaser regarding the sale of the building. The solicitor representing Company A refused to identify the shareholders of the company but wrote that "neither [Company A] nor its shareholder has any interest as shareholder or otherwise in [Company B]." The solicitor representing Company B wrote that the sole beneficial shareholder of Company B is Company C, a foreign company. On the basis of these two letters, the Commissioner concluded that the sale transaction was bona fide and approved a rent increase per unit approximating 25%.

An appeal of the Commissioner's decision was heard on May 11, 1983, before an Appeal Panel. The tenants submitted that the companies had failed to provide information that supported the Commissioner's order. The Appeal Panel reviewed the evidence submitted to the Commissioner and by letter dated June 6, 1983 addressed to Company D, the Chairman of the Appeal Panel, stated:

Furthermore, a review of the evidence from that hearing indicates that the Appeal Panel does not have satisfactory evidence to enable us to make a finding that a bona fide sale of the subject residential complex took place in September 1981 as claimed, which finding might be important in any event, but becomes vital if the evidence indicates an increase in financing took place with the advent of the sale. [Emphasis added]

Consequently, the Appeal Panel requested further submissions from all parties. The solicitor for Company B submitted a Deed, Bill of Sale and a cheque in response to the Panel's request and noted that the land transfer tax and sales tax had been paid. The solicitor for the tenants submitted that it was impossible for the tenants to garner the appropriate information with reference to the sales transaction and was unable to advance their case. As a result, the Appeal Panel found that "The tenants have failed to provide any evidence to prove their case that

the sale transaction was non arms' length and that a non bona fide sale took place." The tenants' appeal was dismissed on October 12, 1983.

With respect to this case, it is the extent of the Commission's inquiry procedure that is at issue and the approach the Act requires a Commissioner and an Appeal Panel to take. Though the Commissioner requested information from the law firm representing each company involved with the sales transaction, it is my opinion that the Commissioner's inquiry and the evidence which he accepted did not meet the Commissioner's statutory duty to "ascertain the real substance of all transactions" and given his statutory discretion to lift the corporate veil and "disregard the outward form of the transactions or the separate corporate existence of the participants," as set forth in section 93(2) of the Residential Tenancies Act. The Residential Tenancies Act gives the Commission the power and authority to investigate matters relating to the sale of residential complexes in order to fulfil its mandate. This suggests that it is unreasonable for a Commissioner to make a finding that a bona fide sale took place until any doubts which he may have had, or should have had, either as a result of the parties' submissions or his own inquiry, are resolved. Despite the information presented to the Commissioner by the tenants, the Commissioner did not ask the landlord for any evidence relating to the identity of the shareholders of the off-shore company which in turn owned the purchasing company, Company B. The landlord was the only person having access to this information which, if obtained, would enable the Commissioner to fulfil his statutory responsibilities under sections 93, 107, 108 and 109 of the Act. Rather, the Commissioner relied solely upon the letters received from the solicitors for the vendor and purchaser and concluded that the sale in question was bona fide.

The tenants appealed this decision on the basis that the Commissioner did not have sufficient information to make a finding of fact that there was a change of beneficial ownership of the building. At this level of proceedings, the tenants had the burden of proving the Commissioner's finding was in error, but the Appeal Panel reviewed the evidence before the Commissioner as well as that requested and received from the lawyer for Company B and ruled that the tenants had failed to prove their case that a mala fide sale took place. Due to the fact that the Commissioner did not require the landlord to provide any evidence on the relationship among Company B, Company A, Company C, and the beneficial owners of Company A, if any, the tenants were faced with an impossible burden of evidence to meet at the appeal level.

Although the proceedings of the Commission under the Residential Tenancies Act would appear to be of an adversarial nature, in my opinion, by virtue of section 93(2) of the Residential Tenancies Act, the Commission either through its own investigation, or through the submissions of the parties, must be satisfied that the real substance of

all transactions and the good faith of the participants has been ascertained, and that all relevant information has been gleaned. Like the Commissioner, however, the Appeal Panel did not ask the landlord, Company B, to identify the shareholders of its beneficial owner, though this information would seem to be extremely relevant to a determination of the bona fides of the sale transaction. The Commission has the duty to ascertain the real substance of a transaction and the good faith of the participants to the transaction. In this case it could not have done so without disregarding the outward form of the transaction and without knowing who the owners of Company C were. As the Appeal Panel did not consider the evidence before the Commissioner to be sufficient for it to make a finding that a bona fide sale took place, it then considered a deed, bill of sale and a cheque as satisfactory evidence of the bona fides of the sale though this additional evidence was merely documents going to the form of the transaction and not its substance. The Appeal Panel similarly did not meet its duty under section 93 of the Act.

In response to my section 19(3) letter to the Chairman, I received a written response from the Senior Legal Counsel dated August 1, 1984, and in addition, on August 21, 1984, I met with representatives of the Residential Tenancy Commission to receive further representations. In attendance were the Chairman and the Senior Legal Counsel. At this meeting the Senior Legal Counsel raised his concern that the Ombudsman, in his section 19(3) letter, was of the opinion that the Commission's proceedings were not of an adversarial nature but rather were of an inquisitorial nature. However, I explained that such was not the case, but in fact I agreed with the Commission's position that the Commission's proceedings would appear to be adversarial but with broad powers of an inquisitorial nature superimposed upon that adversarial process, as specifically provided in the Residential Tenancies Act. In my opinion, these specific inquisitorial powers in the Act should have been invoked by the Commission in the circumstances of this case to determine the true identity of the owners of Company C.

In addition, the Senior Legal Counsel stated that the standard of proof necessary to make a case at the Commission was the civil burden, with which I am in agreement. With respect to the extent of the discretion granted to Commissioners in deciding issues before it, I confirm my discussion with the Senior Legal Counsel and the Chairman wherein I indicated that from my point of view, we were not a court of appeal or conducting a judicial review of the Commission's decision, but that I am looking at the Commission's decision in terms of the Ombudsman Act.

We also discussed the question of whether in this case the issue of the arm's length nature of the transaction was withdrawn before the Appeal Panel of the Residential Tenancy Commission. I note the Senior Legal Counsel's position that this issue was withdrawn by the

complainant at the Appeal hearing. However, in my opinion, such is not the case as evident from the Appeal Panel's order, dated October 12, 1983 wherein paragraph 5, headed Grounds of Appeal states:

The tenants appealed the order of the Commissioner, requesting the Panel to make an order reducing the amount of rental increase permitted in his order. Specifically, the tenants' single claim is that "an inquiry be made into the purchase of the apartment building by [Company B] from [Company A] to ascertain whether the purchase was a non arms' length transaction." (Quote is from notice of appeal filed by the tenants.) Two other issues were listed in the tenants' notice of appeal, namely, that the Commissioner failed to allow the tenants to introduce evidence regarding the standard of maintenance and repair; and, secondly, that the Commissioner failed to make sufficient inquiry to ascertain the real substance of the sale transaction. Both of these issues were withdrawn by the tenants at the hearing and hence have not been considered by the panel.

I further refer to paragraph 24 of the said order, headed Conclusions, which states:

The only ground of appeal entered by the tenants is that the sale transaction is not arms' length and hence the sale was non bona fide.

Thus, the central issue of the arm's length nature of the transaction between Company A and Company B was presented by the tenants at the Appeal hearing. It would appear that my disagreement with the Senior Legal Counsel with respect to this point may arise from the fact that a third issue "that the Commissioner failed to make sufficient inquiry to ascertain the real substance of the sale transaction" was withdrawn by the tenants at the Appeal hearing. In my opinion, this third issue was properly withdrawn by the tenants as it was merely repetitive of the central issue of the arm's length nature of the transaction between the corporate vendor and purchaser and thus redundant. But the withdrawal of this third issue does not constitute the withdrawal of the issue of the arm's length nature of the sale transaction, as is clearly evident from a reading of the Appeal Panel's order.

As a result of this meeting, the Chairman indicated he was prepared to refer this matter to the Appeal Panel for reconsideration and I agreed to hold the case in abeyance until the Appeal Panel did so. In a letter received from the Chairman on September 11, 1984, he advised that he caused a request to be made to the Appeal Panel of the Commission in this case to reconsider its decision of October 12, 1983. However, he

advised that he received a memorandum dated August 24th from the Registrar of Appeals, which stated that the Appeal Panel had considered the request to rehear, but had unanimously rejected the suggestion that an error was made and had consequently refused to rehear this appeal. I note that the Residential Tenancies Act provides no power to the Commissioner or otherwise to require the Appeal Panel to rehear a matter previously decided by it. The only power of rehearing is a limited power found in section 117(9) of the Act which gives an Appeal Panel limited power to rehear an appeal on its own motion, where in its opinion there has been a serious error.

In my opinion, it was the duty of the Residential Tenancy Commission, in reaching a decision on the real merits and justice of this case, to ascertain the real substance of this transaction and activity relating to this apartment building, and the good faith of the participants. In performing this duty, the Commission and its Appeal Panel may pierce the corporate veil. In this case, the Commission has the statutory power to inquire into the true owners of Company C, and in my opinion, without knowing the true owners of Company C, the Commission could not truly say it knew the real substance of the transaction and the good faith of the participants. In an adversarial system the party alleging an issue must prove it, but in proceedings before the Commission, section 93 of the Act clearly contemplates that the Commission's powers of inquiry may be invoked with respect to issues such as the bona fides of the landlord and the true nature of the corporate transaction affecting the tenants' rent. In the case at hand, the tenants could not possibly provide evidence on the true identity of the owners of Company C without the Commission invoking its inquisitorial powers under the Act. Without this evidence, the real substance of the transaction could not be determined. By not making these inquiries, the Commission and its Appeal Panel have failed to perform its statutory duty to determine that a bona fide sale of the subject residential complex took place in September 1981 as claimed.

After considering all of the evidence pertaining to the complainant's case and the representations made to me by the Commission, I have determined, pursuant to section 22(1)(b) of the Ombudsman Act, that the decision of the Appeal Panel of the Residential Tenancy Commission that the sale was bona fide, was unreasonable. Further, the decision of the Appeal Panel was unreasonable within the meaning of section 22(1)(b) of the Ombudsman Act in that it required the tenants to bring forth conclusive evidence on the bona fides of the sales transaction.

It is my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Panel of the Residential Tenancy Commission reconsider its decision and obtain further evidence from the landlord on the issue of the bona fides of the transaction between

Company A and Company B and in particular, the identity of the beneficial owners of Company C and Company A.

It is my further recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Ministry of Consumer and Commercial Relations develop and recommend appropriate legislative amendments to section 93(2)(a) of the Residential Tenancies Act to provide the Commission with a mandatory statutory duty to disregard the outward form of the transactions or the separate corporate existence of the participants, as opposed to its present discretionary power.

My final conclusions and recommendations were reported to the Ministry of Consumer and Commercial Relations and to the Residential Tenancy Commission on November 15, 1984.

On January 31, 1985, I received a response from the former Minister of Consumer and Commercial Relations, which in my opinion was appropriate in the circumstances of this case and the Minister was advised accordingly.

On January 31, 1985, I received a response from the Chairman of Residential Tenancy Commission, who advised that the Appeal Panel had reviewed their decision and stated that, in their opinion, no error was made and that the Appeal Panel had refused to exercise their discretion to rehear this appeal.

As I was of the opinion that the Commission had not taken adequate and appropriate action in this matter, I exercised my discretion pursuant to section 22 (4) and (5) of the Ombudsman Act and referred this matter to the Premier on March 18, 1985. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 5

The complaint against a decision of the Appeal Panel of the Residential Tenancy Commission was first registered with this Office by letter dated October 8, 1982. The complaint was that the Appeal Panel in its order dated October 1, 1982 unreasonably upheld the decision of a Commissioner (1) to allow for only two hours of labour per week by the landlord and family; (2) to reduce the claim for labour incurred in clearing the forest from the sum of \$1,600 to \$1,000; (3) to consider the architect's fees of \$378 as a capital expenditure amortized over a 15-year period; and (4) to allow an interest rate of 15% on capital expenditures financed by the landlord's own funds.

On October 28, 1982, the Chairman of the Residential Tenancy Commission, was notified in accordance with the requirements of the Ombudsman Act, of the Ombudsman's intention to investigate the complaint as summarized above.

The Ombudsman asked the Chairman whether he was prepared to give a statement of his Commission's position regarding the complaint. We received a response from the Senior Legal Counsel for the Residential Tenancy Commission in a letter dated November 24, 1982. Our Office sent a copy of this statement to the complainant and she provided her comments in a letter dated December 10, 1982.

Subsequently, the complainant's file was assigned to a member of my legal staff for legal research and to a member of my investigative staff for investigation. During the course of the investigation, we obtained a copy of the Residential Tenancy Commission's file on the complainant's case and discussed the complaint with the Residential Tenancy Commissioner who originally heard this case, as well as with the Legal Counsel and Registrar of Appeals for the Commission. On March 7, 1983, my investigator interviewed the complainant's son and representative, as well as the complainant, over the telephone. The Residential Tenancies Act, the Residential Tenancy Commission Interpretation Guidelines, and the Commission's Guide to the Cost Revenue Statement were also examined.

Our investigation into the issue of Architect's Fee - Item #13 in Appendix B of the Appeal Order revealed that a draft plan covering the entire house was required in order for the landlord to obtain a building permit to perform work on the third floor apartment, i.e. installing the fire escape and sliding door. The complainant has pointed out that the plan has no future value since such draft work would need to be done again were she to apply for a new building permit, and she considers this fee to be for a service which cannot be properly considered as a capital expenditure but should have been allowed as an operating cost.

The Commissioner was asked about her decision on this issue. She pointed out that the complainant had initially classified this fee as a capital expense on the Cost Revenue Statement. The complainant responded that this was explained as a mistake. According to my investigator's conversation with the complainant's son, the architect's fee was originally claimed as a capital expenditure because of the relatively large amount involved. According to the Commission, because the plan was secured in connection with the third floor renovations (a capital expenditure), the "useful life" of the plan is tied to the life of the capital expenditure of the third floor work, and therefore its cost should be spread over the same time frame.

In the Guide to the Capital Cost Revenue Statement, the difference between capital expenditures and operating expenses is set out succinctly. This guide defines "operating costs" as:

Those costs necessarily incurred in the operation of the complex on a day-to-day basis. Major expenditures, capital acquisitions, financing costs and any costs related to these are to be claimed in item 8 (i.e. Capital Expenditures) or item 9.

Obviously not all expenses fall neatly into one or the other category, but clearly it seems, "any costs related to" a Capital Expenditure, such as the third floor renovations, are to be classified with the expenditure according to this definition.

The Residential Tenancy Interpretation Guidelines set out the rationale for recovering such expenditures over a number of years when stating: "Certain expenditures will be of a nature whereby their benefit will be realized over a number of years and the expenditure itself will not be repeated in each year of operation of the residential complex." This type of expenditure, according to the guidelines, "should be recovered in the form of increased rents over a number of years rather than in total in one single year."

The results of our investigation into this matter were set forth in a letter to the complainant dated June 29, 1983 and her response was received in a letter dated July 8, 1983. Having considered the evidence presented in this matter, I am unable to conclude that the Appeal Panel's decision to uphold the Commissioner's decision to consider the architect's fees of \$378 as a capital expenditure amortized over a 15-year period was unreasonable.

After conducting a careful review of all the material relating to the other issues of the complaint, I wrote to the Chairman of the Residential Tenancy Commission on May 3, 1984 and in accordance with section 19(3) of the Ombudsman Act invited him to make representations with respect to the following possible conclusion and recommendations:

Possible Conclusion

The decision of the Appeal Panel of the Residential Tenancy Commission is unreasonable in that the landlord's claim for: (a) 15-20 hours per week of day-to-day landlord labour; (b) clearing the forest; (c) an interest rate of 18% on capital expenditures; and (d) cementing a furnace room, were rejected. [Reference: Ombudsman Act, section 22(1)(b)].

Possible Recommendation

The Appeal Panel of the Residential Tenancy Commission should hear the landlord's claims for: (a) 15-20 hours per week of day-to-day landlord labour; (b) clearing the forest; (c) an interest rate of 18% on capital expenditures; and (d) cementing a furnace room, pursuant to section 117(9) of the Residential Tenancies Act, and take appropriate steps to notify persons who may have an interest, including the present landlord and tenants of [the building]. [Reference: Ombudsman Act, section 22(3)(g)].

My possible conclusion and recommendation are based on the following information.

Until September of 1983, the complainant was the landlord of a large, 70-year old residence converted over the years into a three-unit family home, located on an extensive (one-third acre), well-planted lot. The property was acquired in March of 1973.

On September 30, 1981, the complainant applied to the Residential Tenancy Commission for a whole-building rent review pursuant to section 126 of the Residential Tenancies Act.

The landlord occupied Unit #1 of the building, with Units #2 and #3 being vacant at the time of the application for rent review. At the time of her application, the monthly rents for Units #2 and #3 were \$528 and \$333 per month respectively. The complainant was applying for an increase to \$700 and \$575 respectively, effective December 1, 1981.

A hearing was held on January 14, 1982 before the Commissioner, and on February 15, 1982, the Commissioner rendered her decision. She determined that the maximum basic rent chargeable for the rental units effective December 1, 1981 would be \$539 and \$443 respectively.

On February 26, 1982, the complainant's son filed a notice of appeal with the Residential Tenancy Commission on behalf of the complainant, stating a number of reasons why the Commissioner's order was "wrong". On March 5, 1982, the complainant's representative wrote to the complainant's MPP, providing him with detailed reasons why the complainant disagreed with the Commissioner's decision, and this letter was forwarded to the Residential Tenancy Commission and found on the Appeal Panel Commissioner's file.

The landlord's two representatives appeared before the Appeal Panel on August 24, 1982, and an increase in the maximum monthly rent chargeable on the two units to \$582 and \$478 respectively was ordered by the Appeal Panel on October 1, 1982.

1) Landlord Labour

With respect to the issue of landlord labour, that is the labour performed by the landlord and her family to keep up the house and property on a day-to-day basis, the complainant did not claim a flat figure for day-to-day landlord labour, but submitted claims under the following headings and in the following amounts:

	<u>1980</u>	<u>1981</u>
Cleaning and Janitorial	\$532.00	\$586.00
Snow removal	120.00	144.00
Grounds keeping	700.00	840.00
Garbage disposal	225.00	250.00
Damage expense capitalized (cleaning and repair)	<u>417.00</u>	<u>690.00</u>
	\$1,994.00	\$2,510.00

The Commissioner, in her written Reasons to the Order dated February 15, 1982, stated "I find that the above amounts to be excessive for the size of the building", and she decided to replace these claims with a blanket amount for day-to-day landlord labour. No further written explanation was provided whatsoever. The Commissioner allotted the landlord two hours per week at \$10 per hour for a total of \$1,040 for 1980 (plus \$200 for cleaning and janitorial materials) totalling \$1,240, with a 6% increase for 1981 totalling \$1,312. This means that the Commissioner decreased the amount claimed by the landlord for day-to-day landlord labour by \$754 for 1980 and by \$1,198 for 1981.

The complainant found the Commissioner's allowance of only two hours per week in landlord labour to cut the lawn, maintain the grounds, clear snow and ice, take out the garbage and maintain a tidy interior, to be totally unrealistic, considering the size and nature of the house and property. In her February 26, 1982 Notice of Appeal, the landlord states: "an atrocious amount of landlord labour was slashed arbitrarily; section 12(i) must be rectified; figures were actually conservative; work about 15-20 hours/week not 2 hr/wk on average."

The Appeal Panel's decision states: "The landlord's representatives argued that the Commissioner had no right to reduce the amount claimed [under landlord labour] but they provided no evidence to the Panel to substantiate their position and hence the Commissioner's decision on this issue stands."

I note that the Appeal Panel had before it the Commissioner's written reasons, and the landlord's description of her claims.

The landlord gave the following recollection of the oral testimony heard by the Appeal Panel on this issue to our investigator:

Since my house ... consists of three units the first Commissioner ... assumed this "to be excessive for the size of the building". However, as I explained to the Appeal Panel, my property is an original triplex (which I have been restoring) with eighteen rooms and huge ravine lot: sixty feet by 300 feet north side and by 190 feet south side. Landscaping alone requires more than two hours of work per week. For instance, my garden contains seven towering elm and maple trees, about ten smaller trees, about ten shrubs, a hedge, many big flower beds -- all of which need a great deal of raking or cultivation or pruning to keep in good order. Then, what about all the other work to which I have to tend?

As for documentary evidence, the complainant had submitted full written descriptions of her claims to the Residential Tenancy Commission prior to her hearing before the Commissioner. These written submissions were found in the Commission's Initial Record File, and, according to the Commission, the Chairman of the Appeal Panel would have had this file. The complainant's original submission included carefully itemized claims for her day-to-day landlord labour, and as an example, I will quote from her description of her 1981 "cleaning and janitorial" claim:

Clean-up after tenant left

- 15 hours on second floor plus 10 hours on third floor at \$6.00 per hour - (plus) 10 hours after chimney cleaned out plus flu	\$210.00
---	----------

Clean windows - 15 hours on basement, first, second, third floors at \$6.00 per hour	\$ 90.00
---	----------

Vacuumed stairwell - one half hour per week at \$5.00 per hour x 52 weeks	\$130.00
--	----------

Sweep sidewalk and porch - one half hour per week at \$6.00 per hour x 52 weeks	<u>\$156.00</u> \$586.00
--	-----------------------------

Other written submissions included the complainant's written Notice of Appeal pointing out the facts she intended to prove at the appeal hearing, and a letter written around the same time by the landlord to her MPP, setting out the details of why she disagreed with the Commissioner's decision; these were found on the Appeal Panel Commissioner's file. The landlord's letter in the Appeal Panel file points out that: "the Commissioner did not appreciate the amount of work

necessitated by a sizeable property", namely 1/3 of an acre, and provided examples to dispute the amount of time allowed by the Commissioner for landlord labour, such as this:

The mowing of the lawn and the cultivation of the flower beds alone require about three hours of work per week in the summer months.

The complainant's evidence before the Appeal Panel clarified the type and amount of work involved in the upkeep of the property. Her representatives apparently made the point that the Commissioner's decision to drastically cut landlord labour was based on a faulty premise: an assumption that the house in question was a conventional triplex located on a standard lot.

It appears that despite the evidence before them, the Commissioner and the Appeal Panel did not recognize the size or nature of the property and the amount of work which its day-to-day upkeep necessitated.

(2) Clearing the Forest

This issue centres on the fact that a ravine in the rear of the complainant's property, which was neglected for between 25-40 years and left to grow wild, was cleared by the complainant and her family of tons of decayed fallen trees, vines, and refuse, including mattresses, broken glass, pop cans, etc. The Commissioner changed the item "clearing the forest" from an operating cost to a capital expenditure and reduced the claim from \$1,600 (or 160 hours at \$10 per hour) to \$1,000. It should be noted that no reasons were offered by the Commissioner in her decision for making this reduction.

During my investigator's interview with the Commissioner, she asked the Commissioner why she had made such a drastic reduction. The Commissioner responded that she did not dispute the landlord's basic description of the type of effort or amount of time that went into clearing the forest, but stated that she found the cost claimed high considering the type of unspecialized work involved. She advised my investigator that she had arrived at the award of \$1,000 by multiplying the number of hours claimed by the complainant x \$6.00 per hour and "rounding it off", instead of granting the \$10.00 per hour claimed by the complainant.

The complainant points out that since the Commissioner herself settled on a rate of \$10 per hour for day-to-day landlord labour in keeping up the interior and exterior of the residence as above noted, then such relatively heavy work as clearing the forest should be worth as much if not more per hour. When the Commissioner was questioned about

this item, she pointed out that the only documentary evidence that she had for it was the landlord's handwritten description which simply states that the forest was cleared, along with the number of hours and rate involved. Since no specialized labour or heavy equipment was involved, she lowered the landlord's claim.

The Appeal Panel stated that it saw "no need to disturb the Commissioner's findings on this matter", since the landlord had provided it with "no convincing evidence in that direction". However, the complainant advises that a vivid oral description of the clearing process was provided at the Appeal Panel hearing, very similar to the complainant's description of the forest-clearing process as written in her letter to her MPP found on the Appeal Panel Record File, which reads as follows:

The 'Forest Clearing' (l2. viii, p.4) was clearly shown to be labour - hours worked by the landlord. This work concerned clearing the 'ravine-type' lot of debris that the previous landlord had allowed to accumulate there. There was, in fact, a potential health hazard as mattresses, broken bottles, amongst other things, had been deposited there. Such a job belongs under maintenance, as it was through lack of maintenance by the previous landlord that the lot assumed the unkempt appearance. The shifting of this expense by the Commissioner reveals her rather biased and subjective assessment of the costs incurred by the landlord. On page 4, part (viii) the Commissioner merely states, "item 'Clear Forest in Backyard' will be considered a capital expense of \$1000". No rationale is offered for her decision. More will be said about this below.

As stated above, the Commissioner failed to provide any reason for lowering the complainant's claim for clearing the forest. The Appeal Panel failed to address this omission, although the failure to provide any reason for a Commissioner's decision would seem to be contrary to section 117(4) of the Residential Tenancies Act, which reads as follows:

Where a notice of appeal is filed under subsection (1), the Commissioner who made the order or decision being appealed shall, where he has not already done so, prepare reasons for the decision or order and give a copy of the reasons to each party to the appeal.

This omission made it difficult for the complainant to respond to the Commissioner's reduction of the claim for clearing the forest.

(3) Interest Rate

The third aspect of the complainant's concerns is with respect to the interest rate applied to capital expenditures. The Commissioner applied the "generally prevailing rate of return on investment" which she found to be 15%. The complainant contends that this rate is lower than the rate of return which she would have received on her investments had she not resorted to equity financing to complete the capital expenditures. When one of my investigators asked the Commissioner about her finding, the Commissioner responded that it would be unfair to consider a rate of 18+% over the life expectancy of the capital expenditure unless the money had indeed been borrowed and the landlord locked into the higher rate, particularly in light of the interest rate fluctuation and anticipated decline that prevailed in 1981. The Appeal Panel took the position that while the interest rate may, on occasion, exceed 15%, it found 15% to be a reasonable rate over the amortized life of the expenditure and confirmed the Commissioner's decision.

Our investigation has revealed that in cases of equity financing, the Commission's policy at the time was to apply the conventional first mortgage rate prevailing in the community. We have been advised by the Central Mortgage and Housing Corporation that the prevailing rate in November, 1981 was 18.8%. The Commissioner did not give any reason as to why the Commission's policy was not applied to the facts of the complainant's rent review application, nor did the Appeal Panel advert to the existence of this policy.

(4) Cementing a Furnace Room

Finally, a contention which came to light during our investigation concerns the complainant's claim for the cost of painting the furnace room under the heading "Painting and Decorating" on the Commission's cost revenue statement and the claim for the cost of cementing the same room to correct water leakage under the heading "Other Building Maintenance". Although there is clearly a difference between painting and cementing, the Commissioner used the claims under these two categories as an example of duplication and excluded the entire cost of cementing the foundation wall of the furnace room. Though the Commissioner advised my investigator that the issue was confusingly presented at the hearing, the complainant's cost revenue statement clearly makes this distinction.

The Appeal Panel decision and documentation on file do not address this particular issue since it was not specifically raised at the hearing. However, in her notice of appeal, the complainant disputed the Commissioner's findings in section 12(vi) of her order, which spoke to this particular issue. Moreover, the complainant's letter to her MPP in the Appeal Panel record file clearly indicated her dissatisfaction with the Commissioner's treatment of her claim.

In response to my section 19(3) letter to the Chairman, I received a written response from the Senior Legal Counsel dated August 3, 1984. In addition, on August 21, 1984 I met with the Chairman and the Senior Legal Counsel.

With respect to the interest rate allowable on capital expenditures, the Senior Legal Counsel emphasized that the Commission's Guidelines are guidelines only and they do not represent the Commission's policy, but merely the opinion of the Board of Commissioners on various subjects of interpretation and procedure. The approaches set out in the Guidelines are not binding on Commissioners, since to attempt to provide otherwise would amount to an improper fettering of their discretion.

In his letter dated August 3, 1984, the Senior Legal Counsel stated:

The appeal panel's reasoning in affirming the Commissioner's decision with regard to this issue, adopting an approach different from that suggested in the Guideline, is clearly set out in paragraph 9 of the reasons for its decision. At the time the Guideline was issued by the Board of Commissioners, interest rates were relatively stable. However, at the times of these hearings, such was not the case, and the Commissioners, in exercising their discretion, chose to adopt what they saw as a more equitable approach. This is especially important in the case of capital expenditures, since these costs are permanently built into the rental structure.

It is respectfully submitted that it was the appeal panel's decision that it would simply not be fair to the tenants to expect them to carry in their rents, such a high interest cost, when such costs could have (and indeed did) subsequently drop substantially.

It is respectfully pointed out in regard that this Guideline was revised by the Board of Commissioners of the Residential Tenancy Commission, in November of 1982 to suggest that the interest rate that might be allowed, should be one that is "deemed to be a reasonable average rate that may be anticipated over the life of the capital improvement. It would appear that the Commissioner, in adopting the approach she did, in fact anticipated over the life of the capital improvement. It would appear that the Commissioner, in adopting the approach she did, in fact anticipated the position which would subsequently be suggested by the Board of Commissioners in this regard.

Having considered all of the information presented to me with respect to this issue, I am in agreement with the Senior Legal Counsel's

position that the guidelines are not binding upon the Commissioner and in the circumstances of this case, the Appeal Panel's decision to uphold the Commissioner's allowance of an interest rate of 15% on capital expenditures, rather than the complainant's requested rate of 18%, was not unreasonable.

With respect to the issue of the furnace room costs, the Senior Legal Counsel has stated that the Commissioner advised him that the evidence given at the hearing by or on behalf of the complainant was presented in a very confusing and unclear manner.

I note that the Appeal Panel's decision and documentation on file do not address the furnace room cementing issue. Appeals to the Panel are not hearings de novo and therefore place upon the appellant the onus to raise all issues in dispute and to introduce evidence to support his or her contentions. In her notice of appeal filed with the Appeal Panel, the complainant disputes the Commissioner's "sleight of hand" dismissal of landlord claim figures in "section 12(vi)" of the decision. Section 12(vi) included a dismissal of three claims, one of which (for the exterior painting of the house in 1980) was restored by the Appeal Panel; the issue of the interior cementing of the furnace room had also been dismissed under section 12(vi) and was therefore apparently also being appealed to the Appeal Panel.

The complainant's representative could not be clear as to what oral evidence was submitted at which hearing, but thought that likely a clarification of the landlord's earlier presentation to the Commissioner had been presented to the Appeal Panel. According to the Appeal Panel documentation, there is no evidence that the particular issue of the internal cementing of the furnace room was ever raised at the Appeal Panel hearing for its consideration and in my opinion, the Appeal Panel did not act unreasonably in failing to overturn the Commissioner's decision on this point.

With respect to the items, landlord labour and clearing the forest, I have considered both the Senior Legal Counsel's oral and written representations on these matters. In particular, I note the Senior Legal Counsel's statement in his letter dated August 3, 1984 that in his opinion, in the circumstances, it was entirely proper for the Commissioner to weigh the evidence against her own information and experience, derived from hearing and deciding numerous similar cases, as to what should be an appropriate allowance for "landlord labour" for a building of this size and type. However, the complainant provided specific examples of the type of labour which she and her family were required to carry out on a weekly basis, and estimated the same at 15 to 20 hours. In light of the fact that the Commissioner drastically reduced these hours to two hours per week, and pursuant to the Senior Legal Counsel's advice that this reduction in landlord labour was based upon

the Commissioner's own information and experience, I note that the Commissioner failed to share her personal information and experience with the complainant to enable the complainant to respond to the Commissioner's views on this matter and refute same, as contemplated by s.109 of the Residential Tenancies Act. The Commissioner's written reasons for so doing, as quoted above, provide no information to enable the complainant to fully argue her case before the Appeal Panel. In my opinion, the Appeal Panel had before it sufficient evidence to substantiate the complainant's claim of 15 to 20 hours per week, which would indicate that the Commissioner's decision to reduce this claim to two hours per week was unreasonable in the circumstances of this case.

With respect to the issue of clearing the forest, I note the Senior Legal Counsel's advice that the Commissioner reduced the hourly rate claim for the labour expended by the complainant and her family, based upon her own expertise. However, no sharing of this expertise was given to the complainant in order to enable her to respond to same. As well, the Commissioner failed to provide any written reasons why she reduced the hourly rate of \$10 claimed by the complainant to \$6 per hour.

The Appeal Panel noted the Commissioner had reduced this item from \$1,600 to \$1,000 and stated that "the landlord argued that his claim should have been allowed but provided us with no convincing evidence in that direction." In my opinion, in light of the Commissioner's having failed to provide any reasons for her reduction of the hourly rate claimed, and having noted the oral testimony which the complainant has advised that she presented before the Appeal Panel on this issue, the Appeal Panel's decision to uphold the Commissioner's decision on this matter was unreasonable in the circumstances.

I wish to further acknowledge my discussion with the Senior Legal Counsel, at our meeting on August 21, 1984, concerning the fact that one of the Appeal Panel members in this case has resigned. The Senior Legal Counsel advised that both he and the Ministry of the Attorney General have reviewed this matter and are in agreement that the remaining two members are not able in law to reconsider this case, were I to make such a recommendation in this matter. I confirm that I discussed with the Senior Legal Counsel the possibility of my recommending that the Residential Tenancy Act be amended to enable the remaining two Panel Members to reconsider a case, where the third Panel Member is no longer available in order that the present legal obstacle may be avoided in future cases. We also discussed the possibility that such recommendation be made retroactively to assist our complainant.

After considering all of the evidence pertaining to the complaint, I have determined, pursuant to section 22(1)(b) of the Ombudsman Act, that the decision of an Appeal Panel of the Residential Tenancy

Commission dated October 1, 1982 was unreasonable to affirm: (a) the decision of the Commissioner to reduce the landlord's claim for 15 to 20 hours per week as day-to-day landlord labour to two hours per week; and (b) the decision of the Commissioner to reduce the landlord's claim to clear the forest from a \$10 hourly rate to a \$6 hourly rate.

It is my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Ministry of Consumer and Commercial Relations develop and recommend appropriate legislative amendments to enable the remaining members or member of an Appeal Panel of the Residential Tenancy Commission to reconsider a prior decision rendered by the Appeal Panel in the absence of a full Appeal Panel, and that such legislation apply to previous decisions. Should such an amendment be made, I further recommend that the Appeal Panel reconsider its decision concerning landlord labour and forest clearing, pursuant to section 22(3)(g) of the Ombudsman Act.

My final conclusion and recommendations were reported to the Ministry of Consumer and Commercial Relations and to the Residential Tenancy Commission on November 21, 1984.

On February 4, 1985, I received a response from the former Minister of Consumer and Commercial Relations which in my opinion was appropriate in the circumstances of this case and the Minister was advised accordingly.

On January 31, 1985, I received a response from the Chairman of the Residential Tenancy Commission, who advised that his prior information to my Office that one of the original members of the Appeal Panel had resigned, so that the remaining members were not able in law to reconsider this case, was in error. In fact, all three original members of the Appeal Panel were still vested with their authority to rehear this matter. As a result, by letter dated February 6, 1985, I informed the Chairman that it was my recommendation that the Appeal Panel rehear this matter pursuant to the conclusion set forth in my report. However, on March 8, 1985, I received a response from the Chairman advising that the Appeal Panel had reviewed its decision and stated that in its opinion no error was made, and that the Appeal Panel had refused to exercise its discretion to rehear this appeal.

As I was of the opinion that the Commission had not taken adequate and appropriate action in this matter, I exercised my discretion and referred this matter to the Premier on March 18, 1985, pursuant to section 22(4) and (5) of the Ombudsman Act. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 6

The complainant attended at the Office of the Ombudsman on April 1, 1981 with a complaint relating to the Ministry of Health. The complainant advised that he had met that morning with Dr. C, then Senior Medical Advisor to the Deputy Minister of Health, who had advised him that the Ministry had not yet made a decision with regard to his complaint. By letter dated August 23, 1981, the complainant wrote to our Office, provided a copy of a letter from Dr. C on behalf of the Minister, dated May 5, 1981, and advised that he was dissatisfied with the position taken. After obtaining additional information from the complainant by telephone on September 1, 1981, my Office assumed jurisdiction on the matter.

On September 15, 1981, we wrote to the Deputy Minister, Ministry of Health, in accordance with the requirements of the Ombudsman Act. We notified him of our intention to investigate the complaint as follows:

Pursuant to the Ontario Health Insurance Plan Schedule of Benefits, it is provided on page 63 under the heading:

Notes and Interpretations

6. Claims for x-ray services when referred by an osteopath, chiropodist or chiropractor to a private x-ray facility are not benefits of OHIP.
7. Claims for x-ray services when referred by an osteopath or chiropractor to a hospital outpatient department are benefits.

However the complainant who is a practising chiropractor in a [community in Ontario] is not allowed to order x-rays or receive reports from the Department of Radiology at the hospital. However in other small communities, chiropractors are allowed to refer their patients to hospitals for x-ray services and also to make similar referrals to [an Ontario university].

The complainant contends that the Ministry is remiss in its failure to insist upon compliance with the provisions of the Schedule of Benefits by the hospital.

We also asked the Deputy Minister whether he was prepared to give a statement of his Ministry's position on the complaint. On October 22, 1981, our Office received a response from Mr. D, former Director,

Institutional Operations Branch, on behalf of the Deputy Minister. A copy of this response was forwarded to the complainant for his comments. The complainant's written representations were received on November 17, 1981.

The Ministry, in its response, referred to the fact that, pursuant to section 31 (now section 30) of Regulation 729 (now 865) under the Public Hospitals Act, no patient can be admitted to hospital except by a licensed physician. The relevant sub-section states:

- (1) No person shall be admitted to a hospital except,
 - a) on the order of a medical practitioner who is a member of the medical staff of that hospital; and
 - b) when the medical practitioner is of the opinion that it is medically necessary for the person to be admitted to the hospital as an in-patient.

It appeared therefore, that, in the Ministry's view, a chiropractor who wished to utilize x-ray facilities in a hospital must have his patient admitted by a licensed medical doctor with privileges. Thus, it seemed that the Ministry was taking the position that admission of the patient was required for the use of the x-ray facilities, notwithstanding the fact that the x-ray use would be in the out-patient department.

Our file on the matter was subsequently assigned for investigation to an investigator in the Directorate of General Investigations. During the course of the investigation interviews were conducted with the complainant and with the following representatives from the Ministry of Health: Mr. D; Dr. E, Chief, Profiles Analysis; Mr. F, former Executive Assistant to the Assistant Deputy Minister, Administration and Health Insurance; Mr. G, Assistant Deputy Minister, Administration and Health Insurance; Dr. H, Associate Deputy Minister, Institutional Health; Mr. J, Executive Assistant to the General Manager, Health Insurance Division; Dr. K, Chief, Medical Claims Policy, Professional Services Branch, Health Insurance Division; and Mr. L, Practitioner Claims Policy Advisor, Professional Services Branch, Health Insurance Division. In addition, a review was conducted of the hospital by-laws, the Public Hospitals Act and Regulations thereunder, and the Health Insurance Act and Regulations thereunder.

My investigation has disclosed the following facts.

An interview was held with Mr. D following our receipt of the 19(1) response. He advised my investigator that in his view there was no substantial difference between the terms in-patient and out-patient and that although Regulation 729 (now 865) might appear to be ambiguous, no

distinction would be drawn between the two categories in the draft amendments to the Regulation. Out-patients would merely be referred to as ambulatory in-patients.

Mr. D did agree however that there was an apparent contradiction between the effects of Regulation 452 of the Health Insurance Act and Regulation 729 (now 865) of the Public Hospitals Act concerning a chiropractor's access to x-ray services. He stated that he had to approach the issue from the perspective of a hospital administrator and therefore supported the position of the local Hospital Commission on this issue.

From a review of documentation provided by the complainant, specifically a letter dated April 23, 1980 from Mr. B, Chairman, Hospital Commission, it appeared that the position of the Commission was as follows:

The Regulations under The Public Hospitals Act [do] not provide for a staff of chiropractors. It does allow the Board to provide Hospital By-laws for the appointment and functioning of Dental Staff but makes no provision for any other health personnel.

The Commission did permit chiropractors to view x-ray films with the patient's permission, but did not allow these practitioners to either order x-rays, or receive reports on them.

According to a December 4, 1979 letter to the complainant from the General Manager of OHIP, x-rays performed by a chiropractor in his office were insured benefits under OHIP to a maximum benefit per patient per year. On the other hand, x-rays performed by the out-patient department of a hospital on referral from a chiropractor were benefits without limitation. In the latter case, the radiology department submitted all claims to OHIP.

Pursuant to OHIP Bulletin No. 4178, issued on August 29, 1983, a definition is provided for "in-patient" and "out-patient" x-rays for billing purposes. According to Mr. J, although it was not stated, it was understood that chiropractors were part of the group of professionals who may refer out-patients to hospital radiology departments with the resulting bill being submitted by the hospital to OHIP.

At this stage of the investigation my investigator spoke with Dr. E and asked him about the Ministry's unofficial actions concerning chiropractors' referral of patients to hospitals' out-patient departments. Dr. E advised that he had received a number of telephone calls from representatives of individual hospitals' Medical Advisory Committees asking whether or not their respective hospitals should be accepting referrals from chiropractors. He advised them that he did not know of any reason why they should not. Dr. E

further stated that he believed this was the same position taken by the representatives of OHIP when so questioned by hospitals' representatives.

In order to determine whether this case involved a matter which could be resolved by the Ministry which seemed to be giving on one hand, while taking away with the other, my investigator contacted Mr. G after speaking with his then Executive Assistant, Mr. F. By letter dated September 22, 1982, the investigator, with the complainant's permission, provided Mr. G with a copy of the letter dated April 23, 1980, addressed to the complainant from Mr. B, with respect to the hospital's position on chiropractic referrals. We were advised that the letter would be referred to the attention of Dr. H to see whether the matter could be resolved.

Subsequently on December 14, 1982, we received a letter from Dr. H which stated in part:

This is an internal policy matter which falls within the jurisdiction of the hospital board.

No further comments were provided by either Dr. H or Mr. G.

The Public Hospitals Act makes the Minister of Health ultimately responsible for all hospital by-laws. It would also appear to be his responsibility to ensure that consistent hospital practices are followed wherever possible. We noted that this responsibility is set out in section 9(1) of the Act which reads as follows:

A hospital shall pass by-laws as prescribed by the regulations, subject to the approval of the Minister. [Emphasis added]

The investigation had shown thus far that officials of the Institutional Health Services Branch were of the view that, not only should chiropractors not be entitled to refer their patients to hospital out-patient departments for x-rays (Mr. D), but that the issue was a matter of internal hospital policy and not, by implication, a matter within the jurisdiction of the Ministry of Health (Dr. H). On the other hand, officials of the Health Insurance Division of the same Ministry were unofficially advising hospitals to accept such referrals. Further, OHIP provided total benefits for radiographic services only if the referrals were to hospital out-patient departments, rather than to private radiologists.

A review of the legislation revealed that the Public Hospitals Act makes a clear distinction between "patients" and "out-patients", and specifically states that an "out-patient" is not admitted as a "patient". Further, the Act does not make any statement to the effect that chiropractors cannot refer patients to out-patient departments for x-ray services.

The Regulations under the Health Insurance Act state that referrals of patients by chiropractors to out-patient departments for x-rays are benefits under OHIP.

It therefore appeared to have been the intent of the Health Insurance Act to allow for these referrals which do not provide any financial benefits to the chiropractors themselves. Rather, the benefits of OHIP coverage were intended for chiropractic patients throughout Ontario.

The position of the local Hospital Commission, as enunciated in the Hospital's By-laws, was that only its medical staff could diagnose, prescribe for, or treat out-patients in the hospital, effectively preventing the complainant from referring his patients for x-rays to the hospital's out-patient department.

It therefore appeared that an anomaly existed. Patients elsewhere had access to insured hospital out-patient x-ray services when referred by a chiropractor. Those resident in this locality did not.

At this stage of our investigation, it appeared open to the Temporary Ombudsman to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Minister of Health had acted unreasonably in his approval of the Hospital By-laws. This approval appeared to have the effect of denying insured out-patient radiology services to patients referred by chiropractors, and therefore appeared to create inequality of access to OHIP insured benefits.

It therefore appeared that it might be open to the Temporary Ombudsman to recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Minister of Health should withdraw his approval of those provisions of the Hospital By-laws which had the effect of prohibiting chiropractors from referring their patients for x-rays to its out-patient department.

It also appeared open to the Temporary Ombudsman to recommend that, pursuant to section 22 (3)(g) of the Ombudsman Act, the Minister of Health should also review the by-laws and practices of all Ontario hospitals to ensure that similar anomalous situations do not exist with respect to chiropractic referrals.

By letters dated December 12, 1983, and directed to the Honourable Keith C. Norton, Q.C., Minister of Health, the Deputy Minister, Ministry of Health, and Mr. A, Executive Director of the hospital, these parties were afforded the opportunity to make representations respecting the possible conclusion and recommendations pursuant to section 19(3) of the Ombudsman Act.

On February 2, 1984, we received the representations from the Hospital through its counsel. Both written and oral representations were received from the Ministry of Health. These representations were summarized in a letter, received by our Office on February 15, 1984, from the Honourable Keith Norton on behalf of himself and the Deputy Minister.

It was the position of the hospital that, given the existing legislation (Public Hospitals Act and Regulation 865), it would be unlawful for the hospital to amend its by-laws as tentatively recommended by the Ombudsman. It suggested that there was a legislative gap and that the hospital by-laws were in accordance with the current legislation.

In essence it was the position of the Minister that he cannot usurp the power of a Hospital Board by demanding conformity with a non-existent regulatory prescription, and that Hospital Boards do not fall within the Ombudsman's jurisdiction.

Prior to our reconsidering this complaint, my investigator contacted Dr. K and Mr. L of the Health Insurance Division of the Ministry.

Dr. K advised my investigator that he was not aware of the legal position taken by those hospitals that did not accept chiropractic referrals. He stated that in his conversations with hospital representatives, he has endeavoured to point out that it would be in the best interests of the patient for x-rays to be performed in the hospital out-patient radiology department. I understand that Dr. K's reasoning for this viewpoint is based in part on the recent advances in technology which have rendered the more modern x-ray machines safer for patients. Better screens in the newer machines direct rays at the area being photographed, rather than at the patient's entire body. On the assumption that hospitals replace their machines on a more frequent basis than do private practitioners, it would seem logical to assume that hospital-based equipment is safer.

In addition, x-rays taken in hospital settings are done under the authority of the Director of Radiology. Accordingly, a radiologist reads the film and provides a written report. I understand from Mr. L that approximately one-third of all chiropractors in Ontario do not own x-ray equipment. It is therefore necessary for them to either use a hospital's radiology services, or the services of a private radiologist. I note that pursuant to the Schedule of Benefits, referrals by chiropractors to private radiologists are not a benefit of OHIP. This therefore creates an additional expenditure for the patient.

Mr. L is the Ministry representative involved in the preparation of a position paper for the Healing Arts and Radiation Protection Committee (HARP). Draft submissions by HARP have been presented to the

Ministry. It is my understanding that the position paper being prepared by Mr. L will include a recommendation that an attempt be made to centralize all x-rays by both medical and non-medical practitioners in hospital radiology departments.

Following receipt of the statements of counsel for the Hospital and the Ministry, and our further investigation, I reviewed the position taken by my Office as expressed in the Temporary Ombudsman's letter of December 12, 1983.

Reconsideration of the Public Hospitals Act and Regulation 865 thereunder, in light of the arguments put forth by the hospital's counsel, led me to conclude that there was in fact a legislative gap which would preclude the Minister of Health from resolving the existing problem as tentatively recommended in our December 12 letter.

Accordingly, consideration was given to other possible means by which a solution to the problems inherent in the complainant's inability to refer his patients to the out-patient department of the Hospital could be identified.

I am of the view that the Minister has a duty to exercise his responsibilities in a consistent manner. If he feels strongly that the use of hospital facilities by chiropractors is of such benefit to the people of Ontario that special provisions under the Health Insurance Plan are made, appropriate revisions of Regulation 865 under the Public Hospitals Act might also be necessary to ensure that benefits are available uniformly throughout the province.

Having considered all the facts of this case, I have come to the following conclusion and recommendation.

Conclusion

I have concluded, pursuant to section 22(1)(b) of the Ombudsman Act, that the Ministry of Health's reply to the complainant's request for assistance unreasonably omitted to respond to his concern about the refusal of the local Hospital Board to allow him to refer his patients for x-rays to its out-patient department. This response was unreasonable because it condones the existence of an anomalous situation where, on the one hand Schedule 15 of Regulation 452 under the Health Insurance Act specifies that when a chiropractor refers patients to hospital out-patient x-ray departments the resulting claim is an OHIP benefit, but on the other, Regulations under the Public Hospitals Act prevent public hospitals from legally accepting such referrals.

Recommendation

It is my recommendation, pursuant to section 22(3)(e) of the Ombudsman Act, that the Minister of Health seek the appropriate amendments to Regulation 865 under the Public Hospitals Act to require public hospitals to accept referrals from chiropractors and osteopaths for radiology services in hospital out-patient departments. This would ensure that the OHIP benefits specified in Schedule 15 of Regulation 452 are equally available to all chiropractic and osteopathic patients throughout the province.

By letter dated September 21, 1984, the Deputy Minister of the Ministry of Health acknowledged receipt of the Ombudsman's Report. Follow-up letters were received from the Assistant Deputy Minister of Health, Administration and Health Insurance, dated November 23, 1984, and February 20 and March 25, 1985. We were advised that discussions were taking place with the Ontario Chiropractic Association, that a survey was being developed with the Association to obtain a better appreciation of utilization patterns, and finally that it was still the Ministry's view that hospitals had the right to provide x-ray services to chiropractors, the final decision resting with each Hospital Board. As the matter had not been resolved by March 29, 1985, my report was forwarded to the Premier.

DETAILED SUMMARY NO. 7

The complainant contacted this Office on April 7, 1983 with a complaint against the Ontario Health Insurance Plan (OHIP). On April 26, 1983, the Ombudsman notified the General Manager of OHIP, of the following complaint.

The complainant's daughter was a psychiatric patient at a U.S. hospital. On January 27, 1982, the complainant was advised by OHIP that due to an amendment to the Regulations of the Health Insurance Act, effective August 21, 1982, OHIP would no longer cover 75% of the costs of providing care for her daughter and, that an additional charge of \$16 per day would be assessed. Under the new regulation, OHIP considered her daughter's accommodation to be at the semi-private rather than standard ward level.

The complainant was also assessed a retroactive charge for the period August 21 to October 31, 1982.

The complainant contended that OHIP's position was unreasonable as her daughter's accommodation was not semi-private, but standard ward accommodation.

She also complained that OHIP's actions denied an insured Ontario resident entitlement to the full percentage (i.e. 75%) of standard rate payment and by so doing has made the cost of insured services a crushing financial burden on the family.

She wanted OHIP to drop the charges for a semi-private room so that her daughter may continue receiving the medically necessary treatment which is not available in Ontario and that OHIP reimburse her for the extra assessment retroactive to August 21, 1982.

By letter dated June 1, 1983, OHIP responded. It re-affirmed the correctness of its position, noting that the complainant's daughter's monthly accounts for the U.S. hospital were stamped "semi-private".

The daughter was diagnosed by doctors both in Ontario and in the United States as a schizophrenic in need of long-term intensive psychotherapy in a hospital-like setting. That diagnosis was initially made in 1977. It continues to be valid today and has never been disputed.

The type of care and treatment which she required was not available in Ontario. In April, 1977, the General Manager of OHIP, in accordance with the Health Insurance Act regulations then in effect, approved the complainant's daughter's hospitalization in the U.S. hospital, and has continued to so approve. She recently returned to Ontario on September 17, 1984 because her family could no longer afford the surcharges imposed by OHIP. She is currently receiving treatment in an Ontario psychiatric hospital.

OHIP was alerted to her so-called semi-private accommodation when the words "semi-private" were stamped on the bills by the U.S. hospital. The bills were submitted to OHIP for payment.

The complainant considered this an error and attempted to clarify the nature of her daughter's accommodation so OHIP would stop levying the semi-private surcharge. Officials at the U.S. hospital wrote to OHIP on December 2, 1983, but without success. The U.S. hospital stated the bill was stamped "semi-private" by its accounting department to satisfy the demands of American insurance companies. The hospital, itself, does not consider the accommodation as being semi-private as distinguished from standard ward. The U.S. hospital only has one kind of accommodation available. Dr. A, Medical Director at the U.S. hospital, stated in his December 2, 1983 letter as follows:

"It is a thirteen bed ward accommodation.... All of the rooms on the ward open onto a hall where the bathrooms, nursing station, day rooms, and living room areas are located. Group bathrooms are used by five to seven patients. Room charges for all patients are the same.... all of our patients are admitted

to a 'ward', which is the only accommodation the Hospital provides - there is no choice." [Emphasis added]

In a "Certificate" dated April 21, 1983, the U.S. hospital stated that:

"[T]he type of accommodation available to [the complainant's daughter] and which she had and will continue to use here, is the only type of accommodation available to her and is the standard accommodation available to all patients and in use for all patients of [the U.S. hospital]. I further certify that this accommodation has been specifically designed for the optimum care and treatment of psychiatric patients and that for the optimum care and treatment of the complainant's daughter it is necessary that she be supplied with this type of accommodation. This type of accommodation is standard ward accommodation at [the U.S. hospital] and is not described as, nor known as semi-private accommodation, whatever the description of such accommodation might be outside [this State]." [Emphasis added]

The complainant's daughter shared her room with another patient. She did not request semi-private accommodation, nor was any other type of accommodation available. Her personal area was actually somewhat smaller than she would have had in a standard ward in an Ontario hospital. There was no bathroom in her room or any other amenity normally found in "semi-private" hospital rooms in Ontario. She shared the bathrooms in the corridor with twelve or fourteen other patients.

In order to determine the merits of the position taken by OHIP that her accommodation at the U.S. hospital is semi-private, the standard should be what is normally applied in psychiatric hospitals in Ontario.

Generally, in Ontario semi-private accommodation is regarded as a two-bed room but with certain amenities such as telephone, shower, or bath in the room.

In the psychiatric hospitals operated by the Ministry of Health, a patient cannot demand a semi-private room as of right. Accommodation is assigned for medical or security reasons. If, on the basis of these criteria, hospital staff assign a patient to a two-bed room, the patient is not charged a surcharge.

At the Clarke Institute of Psychiatry, patients can request semi-private or private accommodation and would be charged a surcharge. If, however, a patient is placed in a semi-private room by the hospital staff for either medical or security reasons or on the basis of bed availability, the patient is not charged a surcharge. A similar policy

pertains in the psychiatric wards of three public hospitals in the City of Toronto, irrespective of the number of beds in the room.

Applying the criteria employed in Ontario psychiatric hospitals, the daughter's accommodation would not be considered "semi-private" on the physical layout of the room alone. Even if she were assigned to what is in fact a semi-private room in Ontario, she would not be charged the semi-private surcharge because it would be for medical and security reasons.

Having found on the evidence that the complainant's daughter's room at the U.S. hospital is not semi-private, either by the U.S. hospital's standard or by Ontario psychiatric facility standards, we then considered the merits of the semi-private surcharge levied by OHIP.

To be clear, there are two different charges involved. First, there is a semi-private surcharge to the complainant. This is charged by OHIP because the regulation does not permit OHIP to pay for semi-private accommodation in a psychiatric hospital. This amount is currently \$22.50. The second charge is applied to the balance of the hospital bill (after the semi-private reduction). The regulation only allows OHIP to pay 75% of the psychiatric hospital's ward rate.

The Ministry's psychiatric hospitals assign patients to accommodation for medical or security reasons and even where patients are placed in two-bed rooms no extra charge is imposed. This is consistent with section 52(2), Health Insurance Act which determines medical and other entitlements of insured persons admitted to psychiatric facilities so designated under the Mental Health Act and Mental Hospitals Act:

s.52(2) An insured person who is entitled to insured services under this Act and the regulation and who is admitted to a hospital under this section is entitled to such services as are required for his maintenance, care, diagnosis and treatment in accordance with this Act and the regulations without being required to pay or have paid on his behalf any additional premium or other charge beyond that necessary to entitle him to insured services under the Plan. [Emphasis added]

The complainant's daughter is an insured person. If the U.S. hospital were in Ontario and designated under either the Mental Health Act or Mental Hospitals Act she would not be charged the surcharge even if her accommodation was a semi-private room. In fact, OHIP would pay the entire cost of her treatment without making the 25% deduction made on the the U.S. hospital accounts. Section 52(2) does not apply to the complainant's daughter because this hospital is an American hospital.

Subsection 40(3) of Regulation 452 also addresses this issue:

s.40(3) Where the attending physician certifies in writing that an insured person's condition is such that he requires immediate admission as an in-patient and standard ward accommodation in an approved hospital is not available because all such accommodation is occupied or where the attending physician certifies in writing that an insured person's condition is such that for his own good or for the good of other patients it is necessary that he be supplied with private or semi-private accommodation he shall be provided by the hospital with private or semi-private accommodation without paying any charge to the hospital for such services. [Emphasis added]

The psychiatric wards in three public hospitals in the City of Toronto have a policy which complies with subsection 40(3); that is, where a patient is assigned to a room by hospital staff for medical or security reasons or on the basis of bed availability, no additional charge is imposed. Subsection 40(3) would apply to patients suffering physical illness as well as mental illness.

In terms of the 25% deduction from her hospitalization costs, the Health Insurance Act regulations and policies discriminate between patients requiring hospitalization for physical illness and patients requiring hospitalization for mental illness where the hospitalization occurs outside of Canada. Section 57(2) of Reg. 452 states:

57(2) Where a person receives treatment in a hospital outside Canada as an in-patient or out-patient, the cost of the insured services paid by the Plan shall be the amount determined by the General Manager [of OHIP] for that hospital.

The General Manager's policy is outlined in the OHIP publication Ontario Health Insurance Plan General Guide, Page 25:

(a) Hospital benefits:

When an insured person receives treatment in a hospital acceptable to the Plan, the full hospital charges for the insured in-patient or out-patient services are payable when the necessary treatment is the result of an emergency, or evidence is provided and confirmed by OHIP that treatment is not available in Ontario. [Emphasis added].

Thus, hospital charges for necessary (non-elective) treatment for physical illness are compensated at 100% when such treatment is not available in Ontario.

Section 58(1)(b) states that:

58(1) Treatment for,

....

(b) Mental illness where the General Manager is of the opinion that suitable facilities are not available in Ontario, rendered by a hospital outside Canada is prescribed as an insured service under the Plan.

Section 58(2) of Regulation 452 as amended provides that:

58(2) The amount payable by the Plan for the insured service described in subsection (1) is, where the accommodation is at the,

(a) standard or public ward level, 75% of the cost thereof; or

(b) private or semi-private level, where there is,

(i) a charge for such accommodation, 75% of the amount arrived at by subtracting the charge, or

(ii) no charge for such accommodation, 75% of the amount arrived at by subtracting the average charge for such accommodation in Ontario,

from the cost of the insured services described in subsection (1) [Emphasis added]

Although accommodation for necessary treatment for physical illness, where such treatment is unavailable in Ontario, is compensated at a rate of 100%, accommodation for necessary treatment for mental illness, where the treatment is unavailable in Ontario, is compensated at only 75%.

Thus, the Regulation authorizes a difference in rates of reimbursement which discriminates against patients like the complainant's daughter for no apparent reason. Moreover, both the reduced rate of reimbursement and the per diem deduction for semi-private accommodation as prescribed by Regulation 452 are inconsistent with the spirit of Section 52 of the Health Insurance Act which governs the reimbursement for the necessary treatment of mental illness in Ontario. OHIP has provided no explanation for this distinction between out-of-province treatment for mental and physical illness.

On June 28, 1984 my Executive Director, the then Acting Ombudsman, forwarded several possible recommendations and conclusions to the General Manager pursuant to section 19(3) of the Ombudsman Act.

OHIP was advised that it could be adversely affected by these possible recommendations and conclusions and was invited to make representations to me.

OHIP initially indicated it would make representations and was granted six months to do so. No recommendations were ever received either to the tentative or final report. We therefore issued our report.

The complainant was aware of OHIP's practice to reimburse only 75% of standard ward accommodation for out-of-province treatment for mental illness prior to her decision to send her daughter to the U.S. hospital. This practice was in accordance with existing legislation. The practice was applied equally to all individuals in the complainant's daughter's situation. Although we were of the view that this practice was in accordance with the provisions of a Regulation that are unjust and improperly discriminatory, we were not prepared to recommend that the complainant be reimbursed for both the 25% deduction and the semi-private surcharge, but only the semi-private surcharge.

In summary then, the following conclusions and recommendations have been reached as a result of our investigation:

1. The action of the General Manager of OHIP in classifying the complainant's daughter's accommodation at the U.S. hospital as semi-private is unreasonable pursuant to subsection 22(1)(b) of the Ombudsman Act.
2. The action of the General Manager in classifying the complainant's daughter's accommodation as semi-private was in accordance with the provision of the regulations made pursuant to the Health Insurance Act, namely subsection 58(2)(b)(ii) of Regulation 452 as amended by Regulation 527/82, R.O. 1982, that is unjust and improperly discriminatory, pursuant to subsection 22(1)(b) of the Ombudsman Act.
3. The action of the General Manager in not reimbursing the complainant 100% of her daughter's hospital bill was in accordance with the provisions of the regulations made pursuant to the Health Insurance Act, namely subsection 58(2) of Regulation 452, R.R.O. 1980 that are unjust and improperly discriminatory.

Based on the above conclusions, we made the following recommendations:

1. The action of the General Manager of OHIP in classifying the complainant's daughter's accommodation as semi-private should be cancelled and her accommodation reclassified as standard ward, pursuant to subsections 23(3)(c) and (g) of the Ombudsman Act.

2. The complainant should receive reimbursement of the total semi-private surcharge levied by the Ontario Health Insurance Plan during the complainant's daughter's stay at the U.S. hospital.

3. The Minister of Health should seek an amendment to section 58(2) of Regulation 452 (as amended) under the Health Insurance Act to bring it into line with section 57(2) of the same Regulation, thereby removing the existing discriminatory gap between mental and physical illness.

Our final conclusions and recommendations were reported to the Ministry on March 6, 1985.

Not having received a response to this report, it was our opinion that a reasonable time had passed and that the Ministry had not taken appropriate or adequate action in this complaint. On March 27, 1985, pursuant to section 22(4) and (5) of the Ombudsman Act, the Premier was informed of the results of our investigation. The complainant, the Minister of Health, the Deputy Minister of Health and the General Manager of OHIP were also notified of the results of the investigation.

DETAILED SUMMARY NO. 8

In a letter received at our Office on January 27, 1983, the complainants complained that the recent construction of a highway beside their 10-acre lot had reduced the value of their property. They suggested that the Ministry of Transportation and Communications (MTC) should provide them with compensation so as to enable them to relocate in an area similar in value to their current home prior to the construction of the highway, and to compensate them for the emotional and physical stress they had suffered during construction and the use of the highway, and to compensate them for professional cleaning that had to be done during the construction program.

On March 7, 1983, the Deputy Minister of Transportation and Communications, was informed of this Office's intention to investigate the complaint. The Deputy Minister was asked to comment, and his response was received on March 23, 1983. Shortly thereafter, an investigation was commenced.

During this investigation, information was obtained in personal interviews with the complainants; Mr. A, Environmental Planner; Mr. B, Environmental Planner; Mr. C, Senior Environmental Planner, Environmental Unit, Planning and Design Section, MTC; and the Executive Assistant to the Deputy Minister.

In addition, the Ministry completed, at our request, an analysis of the traffic noise at the complainants' property. The results of this study, as well as photographs and documentation relating to the construction of the highway and the relevant provisions of the Expropriations Act, were reviewed.

During the investigation the complainants were kept informed of all the material information which was contrary to their interests. Their comments have been noted and I have taken them into account, prior to reaching my conclusion and recommendation.

My Office's investigation revealed the following information.

The complainant is a chartered accountant practising in Ontario. In 1963, the complainants purchased 10 acres of land for \$4,500. Their lot is located approximately one-half mile west of a highway. It is approximately three miles from a town of approximately 5,000, and ten miles from City D.

The complainants' lot is the third 10-acre lot west of the highway. When the lot was purchased, there were no other homes built on the other lots and the area was exclusively agricultural. The complainants state that the rural character of the area initially attracted them to it. In 1965, they constructed a house and a well at a total cost of \$22,250. Additions were built in 1974 and 1977 which involved the construction of a garage, a family room, a storage room and remodelling of the kitchen. The complainants have estimated that these additions cost \$30,000 to \$35,000. In 1974 and 1978, the complainants' children were born; they are now nine and five years old.

In the early 1960s, the Ministry of Transportation and Communications and the City D began planning the construction of the highway. Ministry officials were of the opinion that an efficient, direct transportation route involving a four-lane divided highway was required to connect City E with the freeway. Initially, the Ministry planned to construct the highway due east from City E to the north of City D where it would curve gently southward until it intersected with the freeway.

However, the Ministry later changed its plans and decided to construct the highway in a due easterly direction from City E to Town F,

where it would curve to the south and west of City D until it intersected with the freeway southeast of the complainants' property.

The reconsidered route to the southwest of City D was announced to the public in 1973. Information concerning various alternative routes, cost of construction, traffic flows, environmental impact and agricultural land use was supplied by the MTC and was considered at public meetings in Town F and two other affected communities in April and June, 1973.

The complainants claim that prior to construction, at public meetings held by the MTC, the local residents were told by MTC officials that berms would be constructed to reduce noise and the highway would be built below the present land level to reduce visual and noise impact.

The complainants were very concerned about the rerouting of the highway because their property was situated in the target area. On September 30, 1973, they wrote to the Minister of Transportation and Communications voicing their concern over the new route. Despite their objections and those of other affected residents, the southwesterly route was chosen, which placed the highway within 150 feet of the complainants' property and 300 feet of their house.

In the summer of 1978, construction of the highway between the freeway and Town F was commenced. None of the complainants' property was required for construction.

The complainants felt that they were inconvenienced to a great extent during construction of the highway, which lasted each summer from 1978 to 1981. The complainants were subjected to dust and noise and they complained to the Ministry that no precautions were taken to control these irritants. The complainants resorted to closing all their windows and doors during construction. They sent a cleaning bill of \$112 to the Ministry for the cleaning of windows and interior surfaces. The Ministry refused to pay, taking the position that any damages suffered due to construction were the responsibility of the construction company. In addition, the complainant claimed that gravel trucks raced by their property on the concession road at 70 miles per hour, creating much dust, noise and danger.

Construction was completed and the highway was opened for traffic in November of 1981. In January, 1983, the complainants contacted our Office and generally expressed their complaints concerning the inconvenience they had suffered during construction and the difficulties experienced after the highway was opened to traffic. Specifically, the complainants stated the following:

1. Although the Ministry had promised berms and the lowering of the highway level to reduce traffic noise, berms were not built and the level of the highway was not lowered. Consequently, they are bothered by the noise from the highway.
2. The peace, quiet and general rural character of the property had been destroyed by the proximity of the busy highway. They complained of the sight of dirty trucks with garish advertising, the smell of exhaust fumes, danger from accidents on the road involving tankers, motorists stopping to relieve themselves, weeds growing on MTC property, and their children being cut off from their friends on the other side of the highway.
3. Traffic on the highway is continuous and includes large transport trucks. The vibration from the traffic has often shaken the house, and since the highway has been opened, cracks have appeared in the walls and foundations, which they attribute to vibration from the highway.
4. The proximity of the highway has resulted in several unpleasant experiences. Strange motorists have knocked on their door to request to use the telephone; a car caught fire on the highway outside their home; and a truck blew a tire outside their home, creating a frightening explosion.
5. The value of their home has been reduced by the presence of the highway.

In their correspondence, the complainants stated that due to the great reduction in their enjoyment of their home, they wished to relocate in an area similar to theirs before the construction of the highway. However, since their property value has been reduced, they would require compensation in order to purchase such a property, and they requested the Ombudsman's assistance in obtaining such compensation.

The Ministry's response to my Office's letter of intent to investigate did not address the issue of compensation. Instead, the Ministry stated that no commitment was given by the Ministry to construct the highway at a depressed grade or that berms would be provided. Rather, the Ministry committed itself to considering such, along with other engineering and construction considerations. This response essentially confirmed the earlier position taken by the Minister of Transportation and Communications in his letter of August 23, 1982 to the complainants. In that letter, the Minister stated:

1. At the planning stage of this project, as is customary with most highway planning studies, a number of options

were discussed for consideration in the subsequent design phase. At that early stage, it would not yet be known which particular features could be incorporated into the final design; among these, the possibility of a berm to screen the highway from adjacent properties was undoubtedly discussed. However, in avoiding any taking of property from you and your neighbours, and retaining the existing concession road, we were left with insufficient property to develop a berm of the dimensions required to provide an effective barrier.

In any case, the conditions in this vicinity, in terms of the number of homes affected and the actual noise levels, do not warrant the provision of noise barriers.

2. The grade of the highway also is finalized during detailed design and results from an attempt to balance earth quantities as closely as possible. Because of the various elevation controls, the grade in your vicinity could not be significantly depressed below the existing ground level. A very deep cut would be necessary to achieve a real reduction in noise levels adjacent to the highway.

While I acknowledge that the highway does represent a visual intrusion and does increase noise to some extent, there is nothing we can reasonably do that would afford a significant benefit.

The Deputy Minister, however, stated that he would be willing to have his staff undertake an on-site evaluation of the noise problem in order to assess the severity and develop and evaluate alternative solutions. Such a study was completed at our request and the results were received at our Office in October, 1983.

The purpose of the study was to determine the existing and projected noise levels due to highway traffic at four residential sites along the south side of the highway, including the complainants' property. Noise levels were collected by three methods: actual sound level measurements in the field; a simulated computerized highway traffic noise prediction model; and a manual prediction method, essentially a formula into which are plugged various values.

According to the study's authors, actual sound level measurements are sometimes taken in order to confirm calculated levels in cases where unusual site conditions would be difficult to simulate by the computer model or there is a lack of public confidence in the analysis. However, the authors state that actual sound measurements fail to measure the overall average conditions and they are subject to extraneous noises

such as lawnmowers or temporarily high or low traffic flows. Thus, the authors calculated the average noise levels by three different methods in order to obtain more complete information. The study's summary and conclusions are set out as follows:

The nomograph calculation carried out by M.T.C. indicated a 1982 noise level of 53.3 dBA at the complainants' residence. Ambient noise measurements taken at the subject sites verified the nomograph calculation with an average noise level of 54.6 dBA over 24 hours. Sound levels predicted by computer analysis are slightly higher, averaging 57.0 dBA for the sites in question using 1982 traffic volumes.

It is apparent from the noise predictions and measurements that the construction of the highway has resulted in an increase in noise levels at the subject sites of approximately 10 dBA. M.T.C. noise policy states that:

"Where a new freeway or freeway expansion through an existing residential area will generate a noise level between 55 and 65 dBA upon completion and where the freeway will increase the pre-existing noise levels by 5 dBA or more, then the resultant noise level should be attenuated where feasible".

Planning and design of the subject portion of the highway preceded the development of the above policy. The possibility of developing a berm to screen the highway from adjacent properties was undoubtedly discussed. However, considering the number of homes affected, the relatively low noise levels and the property limitations preventing construction of a very effective noise berm, such a development was judged not feasible. Depression of the highway in a cut deep enough to achieve significant noise reductions was similarly deemed not feasible during the detailed design stage due to various elevation controls including a relatively high water table in this area. Furthermore, any earth produced by excavation to lower the highway grade would have been unsuitable for use elsewhere on the project.

Since attenuation was not considered feasible at the planning and design stages, the site in question can now be considered only on a retrofit basis.

M.T.C. retrofit policy for existing freeways states that:

"Noise barriers should achieve an average total attenuation no less than 5 dBA for sites having noise levels below 70 dBA...."

As indicated in Table 2 (page 11), the computer analysis for this area indicates that an attenuation of scarcely 5 dBA could be achieved by construction of a noise barrier.

M.T.C. policy for Retrofit of Existing Freeways further states that:

"Selection of candidate sites for retrofit shall be based primarily on prioritization of all potential sites. The prioritization shall be a cost benefit analysis which accounts for the cost of the noise control measures in dollars, the number of residences, the summation of the number of dBA the existing noise level exceeds 55 dBA at each residence and the predicted attenuation for each."

Property and drainage constraints prohibit the development of an effective earth berm to protect the subject properties. A noise barrier of sufficient length to provide the predicted attenuation would cost in excess of \$300,000 in addition to necessary drainage alterations and other earthworks. Such a barrier would benefit only four residences, where future (1990) noise levels scarcely reach 60 dBA, and the attenuation provided by a barrier would average only 4.8 dBA. Furthermore, the barrier would have to be constructed between the freeway and the existing gravel service road, thereby offering no protection from noise generated by the traffic on the gravel road. Considering the fact that "an increase or decrease of 3-5 dBA is normally regarded as just perceivable to a receiver" it is not possible to justify the construction of a barrier at this location.

Having examined this site in relation to the 60+ sites already included on the province-wide retrofit priority program listing, it appears unlikely that this site will be competitive for provision of a noise barrier for the foreseeable future.

The study was forwarded to the complainants, who were still of the opinion that they should be compensated for the decrease in the value of their property. In May, 1982, the complainants listed their property for sale for \$135,000. Their listing agent was originally of the opinion that the property was worth \$135,000. However, all of the prospective purchasers have objected to the proximity of the highway. It is currently listed at \$120,000. Since the house has been listed, approximately 10 buyers have looked at it, but none have made an offer. Since each time a buyer comes to the home the complainant must prepare it for viewing, she now tells any agent who calls that the home is beside the highway. She does this because on occasion she has spent a great deal of time and

effort preparing the house for viewing, but the prospective buyer becomes uninterested in the home once he learns of the location of the highway.

Until the highway was built, the complainants never considered leaving their home. It had a quiet rural character and was close to a community which they both enjoyed. The complainant grew up on a farm and dislikes the noise of the city. She states that when the doors and windows are closed and the traffic is light, the noise from the highway is barely audible. However, in the summer, when the windows and doors are open, the noise is deafening, especially when the traffic is heavy. The traffic is heavy from 2:00 to 7:00 p.m. and from 11:00 p.m. throughout the night.

The complainant stated that throughout the night trucks can often be heard approaching when they are a few miles away. The noise gets louder and louder until the truck passes. She likens the effect to that of a dripping tap. It focuses her attention to the point where she cannot sleep. She now takes sleeping pills each evening but they only keep her sleeping until approximately 4:00 a.m.

The complainant stated that he believes fair compensation for the devaluation of his property due to the construction of the highway would be \$25,000. That figure is based on the fact that if he sold his property now for approximately \$100,000, he would have to add at least \$25,000 in order to purchase a property comparable to his present one.

The Expropriations Act would have entitled the complainant to file a claim for injurious affection because of damage caused by the construction of the highway. However, the Act imposes a limitation period of one year from the date that the damage was sustained. Since the construction and the loss of value occurred in 1981, it would appear that the limitation period for bringing an action under the Act has expired. The complainant stated that he did not initiate such an action because he did not realize that there was a time limit, and therefore was not aware that the possibility of such an action would eventually be foreclosed. He felt that he would attempt to obtain assistance from the Office of the Ombudsman, and if that was not successful, he would consider initiating a private action.

According to the complainants they were also discouraged from taking legal action under the Expropriations Act because of the experience of another landowner. In 1961, this landowner purchased 125 acres of land two miles east of downtown London, on which he constructed a custom-built home. This landowner particularly enjoyed the peace, quiet, beauty and serenity of the area. In 1976, the MTC acquired a strip of land adjacent to his property for the purpose of constructing Highway 100. Construction of the highway was completed and it was opened to

traffic in 1977. The closest part of the highway is 32 feet from this landowner's bedroom window.

This landowner applied to the Land Compensation Board for compensation under the Expropriations Act. The Board found that the construction of the highway resulted in a reduction of \$35,000 in the market value of the claimant's property and allowed compensation for injurious affection in that amount. That decision was affirmed on Appeal to Divisional Court. However, the decision was reversed on appeal to the Court of Appeal of Ontario. (See St. Pierre et al. v. Minister of Transportation and Communications, 43 O.R. (2d) 767.)

The Court of Appeal decision states that according to law no claim for compensation for damages resulting from works authorized by statute may be made unless provision is made by that or another statute for compensation. Where compensation is provided for, the specific terms of the statute must be consulted. Section 21 of the Expropriations Act provides that a statutory authority shall compensate the owner of land for loss or damages caused by injurious affection. "Injurious affection" is defined by the Act. According to that definition, the claimants must show that they would have had an action at common law for the reduction in value of the property and that the reduction resulted from the construction and not the use of the highway.

To succeed, "a physical interference with a right which the owner was entitled to use in connection with his property which substantially diminished its value" would have to be demonstrated. In other words, a claimant would have had to have a common law right of action. An example of such interference would be the use of a right-of-way, or access to a public highway. However, in the court's opinion it is not sufficient to merely show an indefinable loss of the enjoyment of the property.

The court stated that, in this case (St. Pierre), the real cause of the reduction in value was the loss of privacy, the noise, vibration, smell, fumes, and smoke which accompany any modern highway. According to common law, the loss of privacy and view of a rural landscape are not actionable and are, therefore, not compensable in this case. The noise, smell and vibration result from the use of the highway and not the construction and are therefore also not compensable under the Expropriations Act.

The court stated that although the reasonable apprehension of such complaints may result in the reduction of the value of adjacent lands and therefore be a nuisance in itself, according to common law, if no land is taken, there can be no claim for compensation based on reasonable apprehension of use. The court held that:

Where the Expropriations Act broadens the definition of injurious affection, it does so in clear terms; where, as in this case, it employs the language of case law, it must be held that the legislature intended that the words used would have the same meaning that they had before. The reduction in the market value of the claimants' lands, caused by the apprehension that the new highway would be used for its intended purpose, was not "injurious affection" within the meaning of the Act, and is not compensable.

This landowner was recently granted leave to appeal this decision to the Supreme Court of Canada. However, one of the Ministry's lawyers involved in the case estimated that the case will not be heard until May or June, 1985.

The complainants have stated that given the uncertain nature of this area of the law, they were not willing to invest the very substantial sums which would be necessary to litigate the issue.

During the course of this investigation, I considered two issues. First, I considered whether the MTC should be responsible for the cleaning bill of \$112 incurred by the complainants as a result of dust generated by the construction of the highway. Secondly, I considered whether the complainants should be compensated for the devaluation of their property due to the construction of the highway.

With respect to the cleaning bill, I am pleased to note that during the course of the investigation, as a result of a meeting with my staff, the Ministry agreed to reimburse the complainants for the cleaning bill. I therefore consider that aspect of the complaint to be resolved.

Conclusion

With respect to the second issue, it appears that the Legislature of Ontario has created in the Expropriations Act a remedy for those whose lands are injuriously affected by public works. However, as the law in Ontario now stands, the Expropriations Act does not provide compensation for the reduction in value due to the use and not the construction of that work. In my opinion, although the Expropriations Act is the appropriate remedy for those whose lands are injuriously affected, in the case of those who suffer a loss due to the use of the public works, the law is inadequate and unreasonable.

It is therefore my conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that the omission of the MTC to compensate the complainants for the devaluation of their property due to the use of the highway was in accordance with the provisions of the Expropriations Act which, as the Act applies to the circumstances of this case, are unreasonable.

Recommendation

To recommend that the Ministry compensate owners for the devaluation of their property in cases such as this would have far-reaching implications for the Ministry of Transportation and Communications (and other expropriating agencies) since undoubtedly many property values are adversely affected by the presence of public works. I am therefore recommending, pursuant to section 22(3)(a) of the Ombudsman Act, that the Ministry of the Attorney General refer the issue of compensation for injurious affection arising from the use of public works to the Ontario Law Reform Commission for a report and recommendations on this issue.

My final conclusion and recommendation were reported to the Attorney General on August 15, 1984. The Attorney General subsequently advised me that he did not intend to implement my recommendation. On March 29, 1984, therefore, I sent a copy of my report and recommendation to the Premier, pursuant to section 22(4) and (5) of the Ombudsman Act. The complainant was advised and the file was closed thereafter.

DETAILED SUMMARY NO. 9

On December 22, 1982, our Office received this complaint against a Workers' Compensation Board Appeal Board decision dated December 10, 1982. The complainant contended that the Appeal Board was unreasonable to deny him entitlement for his liver disease as being causally related to his employment with the accident employer.

On January 13, 1983, the Chairman of the Workers' Compensation Board was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. The Chairman was also asked whether he was prepared to make a statement of the Board's position on the complaint. On January 21, 1983, a reply was received indicating that the Board did not wish to make a statement at that time. Our file on the complaint was assigned to a member of our investigative staff. The investigator thoroughly reviewed the complainant's Workers' Compensation Board file and considered the relevant legislation and Board policy and practice in relation to the issue.

Our investigation revealed that in November 1979, the complainant requested entitlement for his disability diagnosed as hepatitis which he related to his exposure to chemicals during his employment with the accident employer. In January 1980, the Board conducted a field investigation to determine which chemicals the complainant had been in contact with and also to obtain a job description. That investigation revealed that the complainant had commenced employment as a spot press operator on

March 8, 1972. His job consisted of grinding and sanding the rough parts of cast iron molds so that they would fit together properly. Following the sanding operation, the complainant used a rag with kerosene or alcohol to remove from his machine the blue dye that was used during the operation. His job of removing the blue dye was performed once a day. At times, the complainant also used an air hose to blow out the alcohol that settled in the grooves.

The complainant indicated that he experienced fatigue and nosebleeds approximately one year prior to reporting his condition to the Workers' Compensation Board. He sought medical attention from Dr. A, who submitted to the Board a report which showed a diagnosis of hepatitis and which recommended that the complainant find a new job. The complainant laid off work on November 2, 1979.

The complainant died on July 18, 1984, and the cause of death was liver failure secondary to his hepatoma. Since the complaint deals with a medical issue, the medical opinions expressed regarding his liver disease have been summarized as follows:

Medical Opinions:

(1) November 14, 1979 - Dr. B (Specialist in Internal Medicine)

Because of the complainant's continuing complaints, Dr. A referred him to Dr. B who performed a liver biopsy on November 7, 1979. The diagnosis was "post-necrotic type cirrhosis with changes of chronic nonspecific hepatitis". In his letter to the complainant's employer, Dr. B stated:

... investigation in the hospital confirmed that he had chronic nonspecific hepatitis but no evidence of any Australian Antigen or a viral particle in his blood stream or liver. Therefore, it is possible that his hepatitis is most likely due to exposure to different toxins and it is felt that further exposure may cause progression of his liver disease. It is advisable that he be placed in a job situation where exposure is minimal and should wear a mask if possible.

(2) February 20, 1980 - Dr. B

A Board investigator requested medical documentation from Dr. B. His letter to the Board reads in part:

A liver biopsy was done which showed post-necrotic type of cirrhosis with changes of chronic nonspecific hepatitis and on reviewing the biopsy, it was felt that this was probably due to a toxin causing the post-necrotic cirrhosis and causing the associated chronic hepatitis. His Australian antigen and antibody were negative and this basically includes Viral B hepatitis as a contributing factor. Viral A hepatitis is unlikely to result in this type of clinical and histological liver disease.

Therefore, in view of this man's exposure to numerous toxins at work, the possibility still remains that this probably could be an industrial exposure to the various toxins that he works with. These include kerosene and other hepatotoxins, the details of which are not available to me.

- (3) March 14, 1980 - Dr. C (Medical Consultant - Occupational Health Branch - Ministry of Labour)

Dr. C visited the employer's premises on March 1, 1980 in order to observe the spotting press operation. He commented that the grinding operation was a dry process and no dust was generated during the operation. Dr. C indicated that the complainant had always worked on the spotting press operation. He expressed the opinion that the complainant's symptoms of chronic active hepatitis were unlikely to be work-related.

- (4) February 23, 1981 - Dr. C

Dr. C was asked to determine if there was any possible occupational exposure of workers to chemical fumes in the plant. Dr. C noted that occupational exposure at the plant consisted of kerosene (Shell), industrial alcohol, machine cleaner solvent and blue dye. He outlined that on a yearly basis, 30 gallons of kerosene, 10 gallons of industrial alcohol, 25 gallons of machine cleaner solvent and 25 4-ounce tubes of blue dye were used at the spotting press machines. Dr. C concluded that "as the spotting press operation is intermittent and the chemicals are used (at the spotting press machines) intermittently, significant health hazard would not be anticipated provided proper work practice are maintained". (sic)

- (5) January 25, 1982 - Mr. D (Industrial Hygienist - The Occupational Health Clinic, St. Michael's Hospital)

On January 25, 1982, Mr. D visited the complainant's former work site.... Mr. D was of the opinion that there was a strong possibility that the complainant's disease was work-related. His report to the Board reads in part:

Based on the complainant's description of his previous work practices, and being aware that the complainant used a paper mask instead of an organic vapour mask, and having observed that no local ventilation has been provided in the spotting press area to remove solvent vapours, it seems quite probable that the complainant did have significant solvent exposure. It would seem that the complainant was acutely exposed to relatively high concentrations of solvents once or twice a day for periods of at least 30 minutes duration, and chronically exposed to solvent vapours for several hours throughout each shift.

Since the complainant habitually worked long hours and worked on weekends, the effect of his exposure to solvents may have been greater than one might expect since he had less opportunity to eliminate any build up of toxins in his body and fully recover from his exposure of the previous working day during his time away from work.

No data is available to me regarding the concentrations of solvents in the work place atmosphere. However, it is possible some estimates of what this exposure may have been one looks at the patient's history (sic). Since the complainant claims to have felt a "burning in his chest" while washing the mold with solvents, his exposure may have been greater than 400 ppm at these times. Since his paper mask was damp with solvents when he washed up, one may assume that the air he breathed had an even greater concentration of solvent than the air around the presses at this time. It is possible that at peak times his exposure to Stoddard Solvents exceeded 400 ppm and that it should be remembered that this was a job he did every working day sometimes seven days per week. (sic)

. . . .

The work practices used by the complainant - the blowing around of solvents with compressed air and

the impregnation of his clothing and paper mask with solvents - are conducive to generating high concentrations of mist and vapour in the atmosphere which will coat surrounding surfaces with solvents which will continue to evaporate more slowly. Thus, there is a possibility of absorbing solvents through inhalation and skin absorption. No local ventilation, organic vapour masks, work practice controls or other administrative controls were used which could have reduced the solvent exposure.

Since the complainant has developed health problems, solvents have been handled more carefully in the spotting press area and the solvent exposure has been divided among several people at the plant.

No one else in the shop did the same job as the complainant nor had a similar exposure to solvents, and therefore it is not particularly remarkable that no one else in the plant has had similar problems.

- (6) February 24, 1982 - Dr. E (Occupational Health Clinic Unit, St. Michael's Hospital)

Dr. E reviewed the complainant's records and in his report dated February 24, 1982, Dr. E indicated that the most likely explanation of the complainant's liver disease was his prolonged exposure to hepatotoxic agents which were not severe. His report reads in part:

The most likely explanation therefore, is a prolonged exposure to not severely hepatotoxic agents. Occupational exposures are immediately the most likely to fit into this category. This man did have exposure on a consistent basis with ethyl and methyl alcohol and other solvents at work. Alcohols will potentiate the hepatotoxic effect of other agents. The aromatic components of Stoddard's solvent or kerosene could be hepatotoxic. Butyl cellusolve in the dye he was using, will, if absorbed through the skin exert a hepatotoxic effect. His complete exposure history appears to be unknown. Although it is reported he could have used less solvent on his job, he appears in fact to have had a fair amount of exposure, including wetting of his work clothes. Therefore this man's liver disease is most likely due to occupational exposures, some of it at least solvent exposure.

(7) July 19, 1982 - Dr. F (Gastroenterologist)

Dr. J, a Board Industrial Medicine Consultant, wrote to Dr. F on June 28, 1982 and requested that he review the complainant's file and provide the Board with his opinion regarding the complainant's case. His reply reads:

... The most interesting piece of information I felt was in relation to the fact that from 1972 to 1980, he was a plastic mold scaler with hand grinding of plastic and requiring brushing the grease from the molds and cleaning the molds. This could result in him coming in contact and inhaling significant quantities of a polyvinyl chloride monomer which is undoubtedly hepatotoxic. The questions I have therefore are: - is there any knowledge at all about the concentrations of this substance in the atmosphere at this time? My opinion would rest in this area since liver disease has been described in workers who have to clean out the vats in a plastic factory.

(8) September 23, 1982 - Dr. F

On September 9, 1982, Dr. J telephoned Dr. F and informed him that the complainant was grinding metal molds and that there was no vinyl chloride present. Dr. F replied:

I apologize for the delay in sending my final report following our telephone conversation and confirmation from you that the above was not in contact with vinyl chloride monomer. In that situation therefore, I am not able to find any apparent evidence of hepatotoxicity of any of the agents which he was in contact with.

(9) October 19, 1982 - Dr. E

The complainant's representative wrote to Dr. E and requested his comments on Dr. F's September 23, 1982 report. His reply reads, in part:

I do not believe there is much that we can add to our case about this gentleman. Dr. F is a new person on the hepatology scene in Toronto as far as I know. One could comment that it is unclear from Dr. F's submission to Dr. J on September 23rd of this year to what extend (sic) he in fact searched the literature for the hepatotoxicity of the various agents involved.

It may be beneficial in restating the case to point out that it rests not only on the lack of a better medical hypothesis (after considerable investigation) for this man's liver disease, but also upon uncertainties in this man's exposure history both for the extend (sic) of exposure and the kind. If I remember the information correctly from the mass of data we had on the complainant, his exposures at the time that he finished working were relatively well known; but those earlier on in his employment are less clear. I believe there was some reference in the complainant's remarks about the solvents that he used that did include some reference to chlorinated hydrocarbons which would more likely be used in the early seventy's than the late seventy's...

(10) April 8, 1983 - Dr. J - a Board Industrial Medical Consultant

Dr. J reviewed the complainant's file and expressed the opinion that:

To presume relationship of this liver complaint to solvent toxicity in a dry grinding operation would be more remote than the usual causes for this complaint, i.e., nutritional and viral. [Dr. J's emphasis]

(11) November 16, 1983 - Dr. J (Memo #71)

In reviewing the complainant's file further, Dr. J noted that the argument of the claim supporters rests on:

1. lack of a better medical hypothesis after considerable investigation of this man's liver disease.
2. uncertainties in this man's exposure history.

Dr. J reiterated that with respect to point #1, to presume a relationship of the complainant's liver complaint to his exposure would be more remote than the usual nutritional and viral causes for his complaint. Dr. J further commented that, with respect to point #2, if there were uncertainties in the complainant's exposure history, then the Appeal Board should decide.

(12) May 18, 1984 - Dr. G (Specialist in Gastroenterology and Hepatology)

As part of our investigation, our Office retained an independent specialist to review the complainant's file.

After reviewing the available medical documentation in conjunction with the November 1979 liver biopsy which was obtained from a local hospital, Dr. G commented:

To date there is no objective published scientific evidence to support a distinct cause and effect relationship between either chronic active hepatitis or cirrhosis and the solvents to which the complainant was exposed. It is worthy of note however that many cases of cirrhosis are seen each year by hepatologists for which there is no known etiology. It is certainly not beyond the bounds of possibility that one or more as yet unidentified solvents contributes to the pathogenesis of such cases. Coupled with the observation that the complainant's gamma GT improved after withdrawing from the work environment in my judgement a cause and effect relationship can not be absolutely excluded. Under such circumstances and after reviewing very carefully all the available data in this case, it is my feeling that the complainant should receive the benefit of any doubt and his claim should be supported.

(13) June 27, 1984 - Dr. K (Board Industrial Medical Consultant)

A copy of Dr. G's report was referred to the Appeal Board panel for its consideration. On receipt of the report, Dr. K was asked to review the complainant's file. Her response reads, in part:

As I review the issues presented here, the gamma GT test is just one of a variety of tests to determine liver function. Improvement in one test is not highly significant. Not withstanding this feature, there are many postulated reasons for such improvement. Simply removal from the work place does not, on a scientific basis, lead to a causal relationship.

Overall, from a scientific/medical standpoint, there is no evidence to support chronic hepatitis as being caused by occupational solvent exposure. The substances are well known in the industrial climate and over the years sufficient study has been done and

chronic hepatitis has not been identified as an adverse health affect. I do not feel that there is sufficient evidence to support an occupational relationship in this worker's chronic hepatitis.

(14) August 15, 1984 - Dr. H (Specialist, a local clinic of the Ontario Cancer Foundation)

Our Office wrote to Dr. H who was the attending specialist at the time of the complainant's death. Dr. H indicated that the cause of death was liver failure secondary to his hepatoma. Dr. H noted that the autopsy report did not give any clues as to the etiology of the complainant's cirrhosis.

During the course of this Office's investigation, I reached the tentative conclusion pursuant to section 22(1)(b) of the Ombudsman Act, that, "The Appeal Board unreasonably concluded that the complainant's liver disease was not causally related to his employment with the accident employer". The Chairman and the accident employer were advised of my possible conclusion and recommendation in a letter dated December 3, 1984. The reasons for my tentative opinion were as follows:

1. The complainant advised the Appeal Board panel that in the early years of his employment, he was not provided with any protective clothing. He supplied his own paper mask, leather apron and cloth gloves. However, he further stated that even with the mask and apron, he was exposed to kerosene fumes and his paper mask and clothing were soaked with kerosene as well as blue dye.

The general foreman informed the Appeal Board panel that during the clean-up operation, the complainant used compressed air to blow off excess kerosene from the molds. This procedure has been changed since the complainant left his employment and excess kerosene is wiped up rather than blown away.

In my opinion, the general foreman's explanation of the procedure used to remove the excess kerosene confirms the complainant's statement with respect to his clothing being soaked with kerosene.

2. The general foreman also informed the panel that he had not been aware of any other employees with a problem similar to the complainant's. However, between 1972 and 1979, the complainant was the only employee working on the spotting press machine. It should be noted that no other employee performed the same job as the complainant. Consequently, the fact that no other employees suffered from a similar problem is, in my opinion, irrelevant in this case.

3. Dr. C suggested in February, 1981 that employees working on the spotting press machines "should wear protective clothing, eye protection, impervious gloves and an approved respirator (organic vapour) while applying the blue dye, and while cleaning the dye with industrial alcohol or kerosene". I have noted that none of these items were provided during the complainant's employment from 1972 to 1979.

4. Dr. E, in his February, 1982 report, indicated that the complainant did have exposure to ethyl and methyl alcohol and other solvents on a regular basis. Dr. E expressed the opinion that alcohol would "potentiate the hepatotoxic effect of other agents". He further stated that "the aromatic components of Stoddard's solvent or kerosene could be hepatotoxic". Dr. E was also of the opinion that "butyl cellusolve in the dye [the complainant] was using, will, if absorbed through the skin, exert a hepatotoxic effect".

5. The complainant was investigated for hepatitis during his admission to St. Michael's Hospital from November 13, 1981 to December 23, 1981. Dr. E was of the opinion that the toxic chemical exposure at work contributed to the complainant's liver disease. In support of his opinion, Dr. E noted the complainant's work exposure and concluded that the history of exposure was compatible with the pattern of onset found in such illnesses. He further stated that the complainant's exposure would not have been confined to his breathing the toxins but also there could have been absorption through the skin if the chemicals came in contact with his clothing.

6. Mr. D visited the complainant's work site and, as well, reviewed literature pertaining to toxic chemical exposure. Mr. D expressed the opinion that:

In view of the fact that the complainant has had no previous history of liver disease that he consumed very little alcohol, that there is evidence of a significant exposure to potentially hepatotoxic substances in his workplace, and that it is known that chronic active hepatitis can be caused by exposure to chemicals, I feel that there is a strong possibility that his disease is work related.

7. Independently, both Dr. E and Mr. D reached the conclusion that there was a probable relationship between the complainant's work exposure and his liver disease.

8. I have given careful consideration to the medical opinions expressed by Dr. J and Dr. K who concluded that the complainant's liver disease was not related to his work exposure. I am also aware that Dr. F did not support a relationship. However, he did not substantiate his decision with detailed reasons. In addition, I have noted that Dr. G is in agreement with the Board physicians that there is no objective published scientific evidence to support a distinct cause and effect relationship. However, after reviewing all the available information, he expressed the opinion that the complainant should receive the benefit of any doubt and his claim should be supported.

I tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act that, "The Appeal Board should revoke its decision and grant the late complainant entitlement for his liver disease as being causally related to his employment with the accident employer".

The Chairman's response, which was received on February 21, 1985, reads in part:

The Appeal Board has carefully considered your detailed report in this case. On the basis of the available medical evidence, the panel continues to be of the view that the preponderance of such evidence is not supportive of a causal relationship between the complainant's exposure to solvents etcetera (sic), at work, and the development of his liver disease.

In reviewing the medical evidence to which you refer, only Dr. E gives unqualified support to a relationship, in his report of February 24, 1982. His later report of October 19, 1982 is much less emphatic, suggesting that the case for a relationship rests on "the lack of a better medical hypothesis" and "upon uncertainties in this man's exposure history".

The remaining medical evidence is either quite definitely non-supportive, or supportive subject to significant qualifications.

In his report of November 14, 1979, Dr. B suggests that "it is possible" the complainant's hepatitis is related to exposure to toxins. In a subsequent report of February 20, 1980, he reports that "the possibility still remains" that it "probably" was related.

Mr. D, an Industrial Hygienist, concedes that he has no data regarding concentrations in the workplace. He goes on to speculate that "estimates" of exposure are "possible", based on

the complainant's history. He concludes that "it is possible" that at peak times, exposure to Stoddard Solvent exceeded 400 ppm. This hypothesis should, of course, be considered in the context of the opinions from Drs. J, G, K and F, none of whom found that the complainant was exposed to liver toxins.

While you appear to place reliance on Dr. G's report as evidence in the complainant's favour, it must be pointed out that the doctor's opinion is rather strongly qualified. He premises his view by making the statement that "there is no objective published scientific evidence to support a distinct cause and effect relationship" and then adds that "a cause and effect relationship cannot be absolutely excluded".

The medical evidence against a finding of relationship is, in the panel's view, much more emphatic. Dr. C in his report of March 14, 1980, expressed the opinion that the complainant's liver disease was "unlikely" to be work related. The panel considers this to be a stronger statement than Dr. B's opinion, when he suggested that a relationship was "possible".

Dr. F, in his report of September 23, 1982, also exhibited more positive views when he stated "I am not able to find any apparent evidence of hepatotoxicity of any of the agents which he was in contact with". Dr. F, a Specialist in Gastroenterology, would certainly have specialized knowledge and expertise in the identification of hepatotoxins and the Appeal Board placed considerable weight on his opinion in this regard.

Dr. J, the Board's Industrial Medicine Consultant and a physician with many years of experience in analyzing cases of liver disease and hepatotoxic agents, was also quite definite in her opinion as quoted at the bottom of page 7 of your report. Dr. J confirmed this opinion subsequently, after further review of the complainant's file.

Dr. K, also an Industrial Medicine Consultant with considerable expertise in this field of medicine, was equally emphatic in her report of June 27, 1984 when she stated that:

Overall, from a scientific/medical standpoint, there is no evidence to support chronic hepatitis as being caused by occupational solvent exposure. The substances are well known in the industrial climate and over the years sufficient study has been done and chronic hepatitis has not been identified as an adverse health affect. I do not feel that there is

sufficient evidence to support an occupational relationship in this worker's chronic hepatitis.

In the Appeal Board's opinion, the combined weight of the medical opinions from Drs. C, F, J and K, all of which are equivocal in their failure to find a causal relationship, by far exceeds the more speculative and qualified opinions from Drs. B, E and G, and the report from Mr. D.

The Chairman concluded by stating that the Board would not take any steps to implement my tentative recommendation.

I have again considered this case in light of our investigation and the Board's representations. The accident employer did not respond to my December 3, 1984 letter.

In my view, this case is of significance not only to the complainant's family, but because it also addresses the Board's approach to the adjudication of industrial disease claims. I am of the opinion that Professor Paul C. Weiler captured the issue of the Board's approach to industrial disease. It is Professor Weiler's opinion that:

The function of a general standard in a compensation program is to give to diseased workers who satisfy it routine acceptance of their claim without requiring specific scientific proof that the disease came from workplace exposure....

While it is important that the Board, in formulating general policy standards for compensating disease claims, draw a reasoned and responsible line, it is not essential that this be a scientifically demonstrable line....

. . . .

... the lack of strong scientific evidence in the vast majority of cases gives rise to the difference between the scientific and the compensation perspective. The scientist can answer that we do not know yet, that we do not have enough data, that we need to await more and better studies. This is the responsible reply dictated by the canons of the scientific method. But the WCB does not have the luxury of saying that it doesn't know, that it won't commit itself. The Board has to decide the case one way or the other. If it decides not to compensate the claim, this implicitly renders a negative verdict on the issue of causality. However, the fact that the scientific evidence is unclear or debatable no more supports the negative than it does the positive conclusion on this issue. In this setting the WCB must frankly recognize that the

scientific material leaves the issue unsettled, and that an informed but pragmatic judgment must be made about which way the available evidence seems to point.

[Protecting the Worker from Disability: Challenges for the Eighties by Paul C. Weiler, April, 1983]

Like Professor Weiler, I am of the opinion that an injured employee should not be penalized because of lack of objective scientific data pertaining to a relationship between the worker's disability and his employment.

With specific reference to this case, I have noted the following medical opinions which, in my view, support my recommendation:

- (1) In his February 20, 1980 letter to the Board, Dr. B was of the opinion that, "...in view of this man's exposure to numerous toxins at work, the possibility still remains that this probably could be an industrial exposure to the various toxins that he works with".
- (2) Dr. E was of the opinion that the toxic chemical exposure at work contributed to the complainant's liver disease.
- (3) Mr. D felt that there was "a strong possibility" that the complainant's liver disease was work-related.
- (4) Dr. G was of the opinion that the complainant should receive the benefit of any doubt and his claim should be supported.

There is no evidence to suggest any other causes for the complainant's liver disease other than his work. In the absence of such evidence, it is reasonable to accept the above medical evidence which supports a relationship between the complainant's liver disease and his employment. Professor Weiler clearly pointed out that, in many cases, there is a lack of scientific evidence to establish a relationship between an industrial disease and the work environment. Given the facts of this case, it is my opinion that the Board acted unreasonably by not addressing the spirit of the legislation of the Workers' Compensation Act.

It is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board unreasonably concluded that the complainant's liver disease was not causally related to his employment with the accident employer. I recommend, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant the late complainant entitlement for his liver disease as being causally related to his employment with the accident employer.

This recommendation was included in a report to the Chairman dated March 13, 1985.

The Board had not responded to the report and recommendation by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 10

The complaint against Appeal Board decisions of the Workers' Compensation Board dated September 8, 1980 and October 29, 1981 was registered with this Office through correspondence received May 23, 1982.

On July 27, 1982, a letter was sent by our Office to the Chairman of the Workers' Compensation Board in accordance with the requirements of the Ombudsman Act, advising him of our intention to investigate this complaint. In our letter, the complaint was summarized as follows:

1. That the permanent partial disability award of 2% does not adequately reflect the residual disability for the tinnitus.
2. That he is entitled to a permanent partial disability award as a result of his hearing loss suffered while in the course of his employment as a result of exposure to noise.
3. That he is entitled to benefits under section 42(5) of the Workmen's Compensation Act.

We also asked the Chairman whether he was prepared to give a statement of the Board's position on the complaint. The Assistant Secretary replied on behalf of the Chairman in a letter dated August 11, 1982, which stated that, since the complaint filed with the Ombudsman and the issue dealt with by the Appeal Board appeared to be the same, he did not wish to make a statement at that time.

The file was subsequently assigned to a member of my investigative staff for investigation. In a report dated July 14, 1982, the Ombudsman found that the complainant's request for an increase in his 2% award for tinnitus and entitlement to benefits under section 42(5) of the Workmen's Compensation Act (now section 43(5) of the Workers' Compensation Act) could not be supported. Consequently, this report deals only

with the complainant's request for a permanent partial disability award for his hearing loss.

During her investigation into this complaint, my investigator conducted a thorough review of the complainant's Workers' Compensation Board claim file supplied by the Board; also considered were the relevant legislation, policy and practices of the Workers' Compensation Board in relation to the issue.

The Ontario Rating Schedule specifies that a pension will be allocated starting at a 35 decibel bilateral hearing loss. The same schedule states that a 1% pension is given for a 30+ dB loss in one ear. Board officials have explained that this latter provision applies to traumatic hearing loss only. Lastly, the schedule notes that where the worker is over 60 years of age, the compensable hearing loss is arrived at by deducting from the actual hearing loss .5 dB for each year over 60 years of age.

Audiologists from McMaster University Medical Centre and the Canadian Hearing Society were interviewed. The Senior Pensions Medical Examiner for the Canadian Pensions Commission at Sunnybrook Hospital was interviewed on August 20, 1982 and Dr. A, otolaryngologist in chief at a large metropolitan hospital, was seen on November 4, 1982. At that time, copies of his monographs on hearing loss were obtained. Seminars on noise given by the Canadian Acoustical Association were attended by my investigator in the fall of 1982. The complainant was contacted for his comments as well.

The information obtained by my Office has revealed that the complainant, an electrician, began experiencing tinnitus while working for the accident employer in 1974. He saw otolaryngologist Dr. G on June 23, 1975, who sent a letter and report to the Workers' Compensation Board on the following July 4 and 7 respectively. Dr. G mentioned a persistent buzzing in the right ear and diagnosed a high frequency hearing loss of 32.5 dB in the right ear (which would average to 35 dB) and 24 dB in the left ear (which would average to 25 dB).

A further audiogram, taken by Dr. G on March 30, 1976, revealed a right-sided hearing loss of 35 dB and a left-sided hearing loss of 30 dB. A Claims Review Branch decision of August 13, 1976 denied the complainant's claim for industrial hearing loss on the basis that his five-week exposure to high noise levels was insufficient to have caused the hearing loss.

The complainant appealed this decision and further investigation was carried out by the Board regarding noise levels in his working environment. An appointment was also set up by the Board for the complainant to see otolaryngologist Dr. A. Dr. A's examination of

January 4, 1978, revealed a troublesome tinnitus and a 35 dB hearing loss in the right ear, with a 30 dB loss in the left.

A Commissioner of the Board decision dated March 6, 1978 awarded the complainant a 2% pension for tinnitus. He was granted entitlement for minimal hearing loss but no award was made, as the hearing loss was insufficient according to the criteria for allowance of a pension.

Following receipt of this report, the Appeal Board directed that the complainant be seen by Dr. A to be assessed again. However, the complainant requested an immediate decision from the Appeal Board which, on September 8, 1980, found that when the complainant was last examined in January of 1978, following his removal from the high noise levels, his hearing loss did not meet the criteria for allowance of a permanent partial disability award. Consequently, the appeal was denied.

During the course of this investigation, the Ombudsman formed the view that it might be open to him to make a report that would justify a possible conclusion and recommendation pursuant to section 22 of the Ombudsman Act. In a letter dated July 28, 1983, written pursuant to section 19(3) of the Ombudsman Act, he advised the Chairman of this possible conclusion and recommendation:

Possible Conclusion

It would appear that it may be open to me to conclude, pursuant to s. 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of September 8, 1980, was unreasonable to deny the complainant's request for a pension for his hearing loss. In support of this conclusion, I note the following points and arguments.

It is generally agreed that a decrease in hearing after a person has been removed from the workplace cannot be attributed to the working environment. Therefore, it does not seem to me that the Appeal Board's decision to disregard Dr. G's report of 1980 was unreasonable. However, all reports agree that the complainant's hearing loss was in the area of 35 dB in the right and 30 dB in the left ear. The Ontario Rating Schedule states that, for partial hearing loss - one ear only - a 1% pension shall be allocated for a 30 dB plus hearing loss. It has been explained in conversation between the Board and this Office that, although not stated in the policy, this applies only to traumatic deafness. It would appear to me that it is unreasonable for Board policy, in principle, to allow entitlement to a person with a 30 dB loss in one ear and none in the other while it denies the complainant a pension when he has, by

common consent, a 35 dB loss in one ear and a 30 dB loss in the other. What this means is that, as far as I can determine, under existing Board policy, theoretically one person could be more disabled than another and yet, the less-disabled person would be the only one eligible for a pension.

Because I am of the opinion that, regardless of work-related hearing loss origin - traumatic or noise-induced - the resultant handicap should be compensated in an equitable and consistent fashion, I am of the tentative view that the Board's denial of the complainant's request for a pension was unreasonable.

Possible Recommendation

It would appear that it may be open to me to recommend, pursuant to s. 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision of September 8, 1980, and award the complainant a pension for his hearing loss.

The Board and the accident employer were notified of the Ombudsman's possible conclusion and recommendation and given the opportunity to make representations.

In a letter dated August 15, 1983, the Safety Coordinator of the Western Ontario division of the accident employer responded to the Ombudsman's letter. He did not feel that the complainant's six weeks with the accident employer warranted any change in his status and pointed out that the complainant had refused to wear hearing protection until he had been on the job for three weeks.

The Workers' Compensation Board did not respond by letter; instead, a meeting was set up between Dr. E, Hearing Loss Claims, Dr. F, Director of the Medical Branch, and the Assistant Secretary of the Board, with an Assistant Director and the investigator, of my Office. This took place on September 30, 1983, at which time the Board made the following points.

- (1) The Board felt that as Dr. A was a pre-eminent specialist with the finely calibrated equipment of a large metropolitan hospital at his disposal, his or Dr. D's assessment of hearing loss should be accepted over all others.
- (2) With regard to the matter of the pension for partial hearing loss of 30+ dB in one ear resulting from trauma, but nothing if the hearing loss was noise-induced and bilateral as long as the loss in both ears did not exceed 35 dB, the Board's position was that we did not

have the medical expertise necessary to arrive at this opinion. Dr. E stated that there was a different kind of damage that could happen in the case of trauma, and that adjustment would be more difficult for the person with a traumatic hearing loss.

The investigator told the Board representatives that she had done extensive research and interviewing on this subject; none of the audiologists with whom she had talked had shared the Board's opinion, nor had Dr. A. Both Dr. F and Dr. E were of the opinion that if Dr. A were to say that a person with a bilateral loss of 30 dB would be more handicapped than a person with traumatic hearing loss of over 30 dB in one ear, then the Board would reconsider its position. Accordingly, it was decided that our Office would write a letter to Dr. A asking him to examine the complainant and two other complainants in this regard.

Both our position and the Board's were put to Dr. A and his considered opinion on the following was sought:

Are [the complainant], Mr. [] and Mr. [] with their bilateral hearing losses apt to be as handicapped or more so than a person with normal hearing in one ear and a traumatic hearing loss of 30 dB plus (but less than 35 dB) in the other?

Dr. A responded by way of a letter dated November 14, 1983. He responded to the question as follows:

In general terms, the person with a 35/25 dB hearing loss is the more handicapped. If you note the Board's tables, they give a significant weighting to the better ear and a better ear of 25 dB loss is handicapping whereas a better ear of 0 dB loss is not. When the two ears are compounded together, the 25 dB loss in the better ear dominates the handicap rating. Therefore, I believe that all three claimants are more handicapped than your hypothetical person.

This response along with our original letter was forwarded to the Board for its consideration.

The Assistant Secretary of the Board notified my investigator in December of 1983 that Drs. E and F had certain representations they wished to make, but because of their technical nature, felt that the purpose could be best served during a meeting, preferably under the auspices of the new Ombudsman. Accordingly, a meeting was scheduled for March 22, 1984, with Dr. E, Dr. F, the Vice Chairman of Appeals, and the Assistant Secretary from the Board, and the Assistant Director, a counsel and the investigator from my Office.

During the meeting, Drs. E and F basically expanded upon their major points from the September meeting. That is, Dr. E gave detailed explanations for accepting audiological results from a large metropolitan hospital (where Drs. A and D practice) over any others. Despite Dr. A's opinion, the Board continued to hold that traumatic hearing loss of 30+ dB in one ear would be more serious than bilateral hearing loss of approximately 35/25 dB and, again, stated that we did not have the medical expertise to make a decision in this matter.

I have reviewed all the information on file, considered the extensive research carried out by my staff and carefully noted the Board's representations.

In respect to the Board's position that audiological tests from one large metropolitan hospital should take precedence over all others, I am, as a general rule, persuaded that this is not an unreasonable position. The clinical setting and equipment at this hospital are acknowledged to be of the highest caliber. Audiologists at this hospital have tested over 6,500 Workers' Compensation Board hearing loss cases in the last 11 years; their work is exhaustive and complete. The Board does not have its own medical personnel to carry out hearing loss assessments as it does for other disabilities. It seems only reasonable that the Board should seek and depend on expert testing for the purposes of pension assessment. Thus, I am not prepared to conclude that the Board was unreasonable to accept Dr. A's results over those of Dr. G when assessing the extent of the complainant's hearing loss.

The last area of contention involves the Board's policy of allowing a 1% pension for a traumatic hearing loss of 30 dB plus in one ear and no hearing loss in the other, while not allowing a pension for noise-induced bilateral hearing loss of 35 dB plus in one ear but under 35 dB in the other. The Board has argued that these are two different clinical entities and that traumatic loss takes much more adaptation than gradual hearing loss.

I have seen no medical evidence to support this position in any of the medical texts researched. Dr. A's letter makes very clear that, in general, the traumatic hearing loss would not be as handicapping at this minimal level as would the bilateral noise-induced hearing loss. The Board has presented no information to substantiate its position and I can only be persuaded by the evidence available. I therefore conclude that the Board has unreasonably denied the complainant a pension as his hearing loss is beyond that which would make him eligible for a hearing-loss pension were he to be suffering from a traumatic hearing loss.

Lastly, I think it only appropriate to comment on my regret that the investigation of this case could not have been completed

earlier. Essentially, the Board's position has not changed from its meeting with my staff in September of 1983. Yet, at that time, the Board representatives gave my staff to understand that were Dr. A's opinion to support the bilateral hearing loss question, then the Board would be significantly influenced and reconsider its position. However, it was apparent from the March meeting that, despite Dr. A's statements, the Board had not changed its position. While I do not question the Board's right to maintain a different position from that of my Office, I would prefer that the Board be candid about such differences and not hold out the possibility of reconciliation if none exists.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board's decision of September 8, 1980 was unreasonable in denying the complainant a pension for his hearing loss. It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Workers' Compensation Board should revoke its decision of the aforementioned date and award the complainant a pension for his occupational hearing loss.

I forwarded this report to the Chairman of the Board on August 22, 1984. On November 1, 1984, he wrote that the Board would be conducting an exhaustive review of its policy on hearing loss claims, the conclusions of which he would make known to me. Because of the review to be undertaken, the Chairman thought it would be premature to respond to individual recommendations. In a follow-up letter of February 4, 1985, I was informed that the review would not be finished until June 1985. Because I did not feel this complainant should be further prejudiced by having to attend the outcome of a general policy review, I sent a copy of my report to the Premier on March 7, 1985. The complainant was advised of the results of my investigation and the file was closed.

DETAILED SUMMARY NO. 11

The complaint against an Appeal Board decision of the Workers' Compensation Board dated October 5, 1981 was brought to this Office's attention during a personal interview on February 15, 1982.

On May 21, 1982, a letter was sent by our Office to the Chairman of the Workers' Compensation Board in accordance with the requirements of the Ombudsman Act, advising him of our intention to investigate this complaint. In our letter, the complaint was summarized as follows:

That the Appeal Board in its decision dated October 5, 1981 was unreasonable to deny entitlement for a permanent disability award for his compensable bilateral hearing loss.

We also asked the Chairman whether he was prepared to give a statement of the Board's position on the complaint. In a letter dated June 1, 1982, the Board indicated that since the complaint filed with the Ombudsman and the issue dealt with by the Appeal Board appeared to be the same, it did not wish to make a statement at that time.

The file was subsequently assigned to a member of my investigative staff for investigation. During her investigation, the investigator conducted a thorough review of the complainant's Workers' Compensation Board claim file supplied by the Board; also considered were the relevant legislation, policy and practices of the Workers' Compensation Board in relation to the issue.

The Ontario Rating Schedule specifies that a pension will be allocated starting at a 35 dB bilateral hearing loss. The same schedule states that a 1% pension is given for a 30+ dB loss in one ear. Board officials have explained that this latter provision applies to traumatic hearing loss only. Lastly the schedule notes that where the worker is over 60 years of age, the compensable hearing loss is arrived at by deducting from the actual hearing loss .5 dB for each year over 60 years of age.

Audiologists from McMaster University Medical Centre and the Canadian Hearing Society were interviewed. The Senior Pensions Medical Examiner for the Canadian Pensions Commission at Sunnybrook Hospital was interviewed on August 20, 1982 and Dr. A, otolaryngologist in chief at a large metropolitan hospital, was seen on November 4, 1982. At that time, copies of his monographs on hearing loss were obtained. Seminars on noise given by the Canadian Acoustical Association were attended by my investigator in the fall of 1982. The complainant was contacted for his comments as well.

The information obtained by my Office has revealed that, after 24 years with the accident employer, the complainant filed a claim for noise-induced hearing loss with the Workers' Compensation Board in July 1979. The complainant worked with turbines while at the accident employer and retired in 1978.

On July 31, 1979, Dr. H, otolaryngologist, submitted to the Workers' Compensation Board an audiogram for the complainant which revealed a hearing loss of 35 decibels in the left ear and 40 decibels in the right. The doctor's enclosed report stated, in part, that the complainant had "a high tone hearing loss, the result of exposure to noise at work."

Entitlement was denied by the Claims Review Branch in April, 1980 because of lack of exposure to hazardous levels of noise in the work place. A second audiogram by Dr. H on May 6, 1980 revealed a bilateral hearing loss of 40 dB.

In August of 1980, the Appeals Adjudicator confirmed the Claims Review Branch decision. When the complainant appealed this, the Appeal Board requested that further testing both at the work place and on the complainant be undertaken. Accordingly, the complainant was seen by Dr. D, otolaryngologist, on August 21, 1981. Dr. D opined that the complainant's hearing loss was likely due to industrial noise exposure; the audiogram taken at the time revealed that there was a 25 dB hearing loss in the left ear and a 35 dB loss in the right. Based on this audiogram and further tests undertaken at the accident employer, the Appeal Board, in its decision of October 5, 1981, accepted that the complainant's hearing loss was the result of noise exposure at work and granted him entitlement for medical aid benefits. However, because the audiogram taken by Dr. D did not record a bilateral hearing loss of 35 dB, the complainant was refused a pension.

On October 9, 1981, the complainant saw Dr. J, otolaryngologist at a university Medical Centre, who reported that his audiometric test for the complainant revealed a bilateral hearing loss of 35 dB. Accordingly, on October 22, 1981, the complainant requested that the Appeal Board reconsider its decision on the basis of this new evidence.

The Appeal Board, in its decision of December 11, 1981, accepted the findings of Dr. D and the opinion of the Board's Medical Branch that the audiometric test of October 9, 1981 detected deterioration of hearing loss due to aging and inconsistent responses during testing. Reconsideration was denied.

During the course of this investigation, the Ombudsman, formed the view that it might be open to him to make a report that would justify a possible conclusion and recommendation pursuant to section 22 of the Ombudsman Act. In a letter dated July 28, 1983, written pursuant to section 19(3) of the Ombudsman Act, he advised the Chairman of this possible conclusion and recommendation:

Possible Conclusion

It would appear that it may be open to me to conclude pursuant to section 22(1)(b) of the Ombudsman Act that the Appeal Board decisions of October 5, 1981; December 11, 1981; and March 17, 1982 were unreasonable to deny the complainant's request for a pension for his hearing loss. In support of this conclusion I note the following points and arguments.

There is an essential divergence of medical opinion in this case. Three audiometric tests undertaken by specialists on July 31, 1979; May 6, 1980; and October 9, 1981 all revealed a pensionable loss of hearing according to the Board's policy. The Board accepted the only test result which did not show a

pensionable hearing loss. Notwithstanding the opinion of Dr. D, I would point out that the preponderance of medical evidence clearly supports entitlement to a pension. Moreover, there is no evidence to indicate that Drs. H and J are not equally qualified specialists whose finding should be given the same individual weight as Dr. D's.

In reference to the Medical Branch's opinion that aging may have contributed to the deterioration of hearing loss in the complainant's last audiometric test, I would point out that there was only a seven-week difference between the testing conducted by Dr. D and Dr. J. My investigator spoke to several audiologists on this point and none thought that, in seven weeks, aging would be responsible for the hearing loss difference in those two tests.

I would also like to address the issue that, even by Dr. D's calculations alone, the complainant has at least a 35 decibel loss in one ear. The Ontario Rating Schedule states that, for partial hearing loss - one ear only - a 1½ pension shall be allocated for a 30 decibel plus hearing loss. Although not specifically stated as such in the policy, Board officials have informed us that this refers to traumatic hearing loss only. It is accepted that the complainant has more of a hearing loss than this. It would appear to me that it is unreasonable for Board policy, in principle, to allow entitlement to a person with a 30 decibel loss in one ear and none in the other, while it denies the complainant a pension when he has, by the very lowest reckoning, a 35 decibel loss in one ear and a 30 decibel loss in the other.

I am of the opinion that regardless of the origin of work-related hearing loss - traumatic or noise-induced - the resultant handicap should be compensated in an equitable and consistent fashion. In the complainant's case, since the clear majority of medical evidence was not accepted, I am of the tentative view that the Board's denial of a pension was unreasonable.

Possible Recommendation

It would appear that it may be open to me to recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decisions of October 5, 1981; December 11, 1981; and March 17, 1982 and award the complainant a pension for his hearing loss.

The Board and the accident employer were notified of the Ombudsman's possible conclusion and recommendation and given the opportunity to make representations.

Mr. K, counsel for the employer, replied on behalf of the employer in a letter dated August 18, 1983. He requested a certain amount of time in order to obtain access to the Workers' Compensation Board claim file. In a letter dated March 19, 1984, Mr. K sent this Office a letter outlining the hazardous noise levels to which the complainant had been exposed and his opinion that they were not sufficient to cause a hearing loss. However, this was not an issue before the Ombudsman, as the Appeal Board has accepted that sufficient noise levels existed. Mr. K's other argument was that the Workers' Compensation Board's criteria for disability awards were reasonable and should be accepted. In summary, Mr. K argued that the complainant does not fall within the eligibility requirements of the Workers' Compensation Act and therefore should not be entitled to receive benefits.

The Workers' Compensation Board did not respond by letter; instead, a meeting was set up between Dr. E, Hearing Loss Claims, Dr. F, Director of the Medical Branch, and the Assistant Secretary of the Board, with an Assistant Director and the investigator, of my Office. This took place on September 30, 1983, at which time the Board made the following points.

- (1) The Board felt that as Dr. A was a pre-eminent specialist with the finely calibrated equipment of a large metropolitan hospital at his disposal, his or Dr. D's assessment of hearing loss should be accepted over all others.
- (2) With regard to the matter of the pension for partial hearing loss of 30+ dB in one ear resulting from trauma, but nothing if the hearing loss was noise-induced and bilateral as long as the loss in both ears did not exceed 35 dB, the Board's position was that we did not have the medical expertise necessary to arrive at this opinion. Dr. E stated that there was a different kind of damage that could happen in the case of trauma, and that adjustment would be more difficult for the person with a traumatic hearing loss.

The investigator told the Board representatives that she had done extensive research and interviewing on this subject; none of the audiologists with whom she had talked had shared the Board's opinion, nor had Dr. A. Both Dr. F and Dr. E were of the opinion that if Dr. A were to say that a person with a bilateral loss of 30 dB would be more handicapped than a person with traumatic hearing loss of over 30 dB in one ear, then the Board would reconsider its position. Accordingly, it was decided that our Office would write a letter to Dr. A asking him to examine the complainant and two other complainants in this regard.

Both our position and the Board's were put to Dr. A and his considered opinion on the following was sought:

Are Mr. [], [the complainant] and Mr. [] with their bilateral hearing losses apt to be as handicapped or more so than a person with normal hearing in one ear and a traumatic hearing loss of 30 dB plus (but less than 35 dB) in the other?

Dr. A responded by way of a letter dated November 14, 1983. He responded to the question as follows:

In general terms, the person with a 35/25 dB hearing loss is the more handicapped. If you note the Board's tables, they give a significant weighting to the better ear and a better ear of 25 dB loss is handicapping whereas a better ear of 0 dB loss is not. When the two ears are compounded together, the 25 dB loss in the better ear dominates the handicap rating. Therefore, I believe that all three claimants are more handicapped than your hypothetical person.

This response along with our original letter was forwarded to the Board for its consideration.

The Assistant Secretary of the Board notified my investigator in December of 1983 that Drs. E and F had certain representations they wished to make, but because of their technical nature, felt that the purpose could be best served during a meeting, preferably under the auspices of the new Ombudsman. Accordingly, a meeting was scheduled for March 22, 1984, with Dr. E, Dr. F, the Vice Chairman of Appeals, and the Assistant Secretary from the Board, and the Assistant Director, a counsel and the investigator from my Office.

During the meeting, Drs. E and F basically expanded upon their major points from the September meeting. That is, Dr. E gave detailed explanations for accepting audiological results from a large metropolitan hospital (where Drs. A and D practice) over any others. Despite Dr. A's opinion, the Board continued to hold that traumatic hearing loss of 30+ dB in one ear would be more serious than bilateral hearing loss of approximately 35/25 dB and, again, stated that we did not have the medical expertise to make a decision in this matter.

I have reviewed all the information on file, considered the extensive research carried out by my staff and carefully noted the Board's representations.

In respect to the Board's position that audiological tests from one large metropolitan hospital should take precedence over all others, I am, as a general rule, persuaded that this is not an unreasonable

position. The clinical setting and equipment at this hospital are acknowledged to be of the highest caliber. Audiologists at this hospital have tested over 6,500 Workers' Compensation Board hearing loss cases in the last 11 years; their work is exhaustive and complete. The Board does not have its own medical personnel to carry out hearing loss assessments as it does for other disabilities. It seems only reasonable that the Board should seek and depend on expert testing for the purposes of pension assessment. Thus, I am not prepared to conclude that the Board was unreasonable to accept Dr. A's results over those of Drs. J and H when assessing the extent of the complainant's hearing loss.

The last area of contention involves the Board's policy of allowing a 1% pension for a traumatic hearing loss of 30 dB plus in one ear and no hearing loss in the other, while not allowing a pension for noise-induced bilateral hearing loss of 35 dB plus in one ear but under 35 dB in the other. The Board has argued that these are two different clinical entities and that traumatic loss takes much more adaptation than gradual hearing loss.

I have seen no medical evidence to support this position in any of the medical texts researched. Dr. A's letter makes very clear that, in general, the traumatic hearing loss would not be as handicapping at this minimal level as would the bilateral noise-induced hearing loss. The Board has presented no information to substantiate its position and I can only be persuaded by the evidence available. I therefore conclude that the Board has unreasonably denied the complainant a pension as his hearing loss is beyond that which would make him eligible for a hearing-loss pension were he to be suffering from a traumatic hearing loss.

Lastly, I think it only appropriate to comment on my regret that the investigation of this case could not have been completed earlier. Essentially, the Board's position has not changed from its meeting with my staff in September of 1983. Yet, at that time, the Board representatives gave my staff to understand that were Dr. A's opinion to support the bilateral hearing loss question, then the Board would be significantly influenced and reconsider its position. However, it was apparent from the March meeting that, despite Dr. A's statements, the Board had not changed its position. While I do not question the Board's right to maintain a different position from that of my Office, I would prefer that the Board be candid about such differences and not hold out the possibility of reconciliation if none exists.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board's decision of October 5, 1981 was unreasonable in denying the complainant a pension for his hearing loss. It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Workers' Compensation Board should revoke its decision of the aforementioned date and award the complainant a pension for his occupational hearing loss.

I forwarded this report to the Chairman of the Board on August 22, 1984. On November 1, 1984, he wrote that the Board would be conducting an exhaustive review of its policy on hearing loss claims, the conclusions of which he would make known to me. Because of the review to be undertaken, the Chairman thought it would be premature to respond to individual recommendations. In a follow-up letter of February 4, 1985, I was informed that the review would not be finished until June 1985. Because I did not feel this complainant should be further prejudiced by having to attend the outcome of a general policy review, I sent a copy of my report to the Premier on March 7, 1985. The complainant was advised of the results of my investigation and the file was closed.

DETAILED SUMMARY NO. 12

The complaint against an Appeal Board decision of the Workers' Compensation Board dated October 21, 1981 was registered with this Office through correspondence received November 19, 1981.

On December 17, 1981, a letter was sent by our Office to the Chairman of the Workers' Compensation Board, in accordance with the requirements of the Ombudsman Act, advising him of our intention to investigate this complaint. In our letter, the complaint was summarized as follows:

That the Appeal Board in its decision dated October 21, 1981 was unreasonable to conclude that his employment-related hearing loss was insufficient in terms of a clinical rating, as it pertains to the Ontario Rating Schedule, to warrant a permanent partial disability award. The complainant feels his hearing loss comes within these requirements and that he should receive a permanent partial disability award.

We also asked the Chairman whether he was prepared to give a statement of the Board's position on the complaint. The Vice-Chairman of Appeals, in his letter dated January 6, 1982, indicated that since the complaint filed with the Ombudsman and the issue dealt with by the Appeal Board appeared to be the same, he did not wish to make a statement at that time.

The file was subsequently assigned to a member of my investigative staff for investigation. During her investigation, the investigator conducted a thorough review of the complainant's Workers' Compensation Board claim file supplied by the Board; also considered were the relevant legislation, policy and practices of the Workers' Compensation Board in relation to the issue.

The Ontario Rating Schedule specifies that a pension will be allocated starting at a 35 dB bilateral hearing loss. The same schedule states that a 1% pension is given for a 30+ dB loss in one ear. Board officials have explained that this latter provision applies to traumatic hearing loss only. Lastly the schedule notes that where the worker is over 60 years of age, the compensable hearing loss is arrived at by deducting from the actual hearing loss .5 dB for each year over 60 years of age.

Audiologists from McMaster University Medical Centre and the Canadian Hearing Society were interviewed. The Senior Pensions Medical Examiner for the Canadian Pensions Commission at Sunnybrook Hospital was interviewed on August 20, 1982 and Dr. A, otolaryngologist in chief at a large metropolitan hospital, was seen on November 4, 1982. At that time, copies of his monographs on hearing loss were obtained. Seminars on noise given by the Canadian Acoustical Association were attended by my investigator in the fall of 1982. The complainant was contacted for his comments as well.

The information obtained by my Office has revealed that the complainant worked for the accident employer for approximately 30 years as a locomotive engineer. He voluntarily retired at the age of 60 in 1973; he has since explained that his early retirement resulted from his hearing difficulties at that time.

The complainant was seen by Dr. B, otolaryngologist, on July 21, 1977. At that time, a hearing loss of 45 decibels in the right ear and 35 decibels in the left ear was recorded; this hearing loss Dr. B felt was due to a combination of acoustic trauma and presbycusis, with by far the major portion of the hearing loss resulting from acoustic trauma.

On May 22, 1980, the complainant was seen in consultation by otolaryngologist Dr. C; a hearing loss of 40 dB in the right ear and 35 dB in the left was noted. Accordingly, on May 25, 1980, the complainant registered a claim with the Workers' Compensation Board.

In a letter dated November 13, 1980, the Claims Review Branch denied the complainant's claim on the grounds that inquiries had established that he had not been exposed to noise levels in excess of the accepted criteria to cause hearing loss.

However, an Appeals Adjudicator decision dated April 7, 1981, found that the complainant was a credible witness and had had sufficient exposure to high level noise intensity during the course of his employment to cause hearing impairment.

The complainant saw Dr. C again on May 13, 1981, at which time similar findings to the original examination of a year prior were

recorded. On June 12, 1981, the complainant returned to Dr. B, whose report of the same date stated: "His pure tone Audiogram clearly indicates acoustic trauma and there is essentially no change from his 1977 Audiogram which means there has been very little presbycusis effect."

The accident employer appealed the decision of the Appeals Adjudicator; following the hearing held on June 26, 1981, the Appeal Board made arrangements for the complainant to be seen by otolaryngologist Dr. A, who saw him on July 30, 1981. The audiogram taken at that time revealed a 40 dB loss in the right ear and a 30 dB loss in the left. Dr. A stated in his report that he thought the hearing loss was wholly due to noise exposure. Nevertheless, when the Medical Branch made its calculations it deducted 3.5 for the complainant's age, which was 67 at that time, and came up with a hearing loss of 35 dB in the right ear and 25 dB in the left. Consequently, in its decision dated October 21, 1981, the Appeal Board concluded that the complainant's hearing loss was noise-induced, but that it was not sufficient to warrant a permanent disability award.

During the course of this investigation, the Ombudsman formed the view that it might be open to him to make a report that would justify a possible conclusion and recommendation pursuant to section 22 of the Ombudsman Act. In a letter dated July 28, 1983, written pursuant to section 19(3) of the Ombudsman Act, he advised the Chairman of this possible conclusion and recommendation:

Possible Conclusion

It would appear that it may be open to me to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of October 21, 1981 was unreasonable to deny the complainant's request for a pension for his hearing loss. In support of this conclusion, I note the following points and arguments. There is an essential divergence of medical opinion in this case. Four audiometric tests, taken by two different specialists on July 21, 1977; May 22, 1980; May 13, 1981; and June 12, 1981 all revealed a pensionable loss of hearing. The Board accepted the only test result which did not show a pensionable hearing loss. Without in any manner disputing the qualifications of Dr. A, who is an acknowledged authority, I would point out that the preponderance of medical evidence clearly supports entitlement to a pension. Moreover, there is no evidence that Drs. C and B are not equally qualified specialists whose findings, collectively, should be given more weight than Dr. A's single report.

Also, I would question in this particular instance, the Board's deducting points for presbycusis when calculating the hearing

loss. Dr. B in his report of June 19, 1981 clearly stated that there had been no presbycusis effects since the 1977 audiogram, and Dr. A, in his report which the Board otherwise accepted, opined that the hearing loss was wholly due to noise exposure. Thus, I am tentatively of the opinion that the presbycusis deduction was unreasonably applied in this case, as the medical evidence clearly does not support such a practice in the case of the complainant.

I would also like to address the issue that, even by Dr. A's calculations alone, the complainant has at least a 35 dB loss in one ear. The Ontario Rating Schedule states that, for partial loss - one ear only - a 1% pension shall be allocated for a 30 dB plus hearing loss. The Board has stated, in earlier discussions with our Office, that this policy applies to traumatic loss only; nevertheless, it is accepted that the complainant has more of a hearing loss than that which would be eligible for a pension under the policy presumably only applying to traumatic loss. It would appear to me that it is unreasonable for Board policy, in principle, to allow entitlement to a person with a 30 dB loss in one ear and none in the other, while it denies the complainant a pension when he has, by the very lowest reckoning, a 35 dB loss in one ear and a 30 dB loss in the other.

Because I am of the opinion that regardless of work-related hearing loss origin - traumatic or noise-induced - the resultant handicap should be compensated in an equitable and consistent fashion and, since the clear majority of medical evidence was not accepted, I am of the tentative view that the Board's denial of the complainant's request for a pension was unreasonable.

Possible Recommendation

It would appear that it may be open to me to recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision of October 21, 1981 and award the complainant a pension for his hearing loss.

The Board and the accident employer were notified of the Ombudsman's possible conclusion and recommendation and given the opportunity to make representations.

A letter was received from the accident employer on August 5, 1983, stating that at the Appeal Board hearing, its representative had maintained that the complainant's hearing loss did not arise out of his employment with the employer. As the employer was still of that opinion,

it requested that our Office investigate the Appeal Board's decision to allow the complainant entitlement for noise exposure resulting from his employment. Accordingly, a file was opened and the Workers' Compensation Board was notified of our intention to investigate. The Temporary Ombudsman, issued a report dated November 29, 1983, the substance of which dealt with the employer's representations that other facts had caused the complainant's hearing loss. The investigator assigned to the case discovered that reports carried out by Labour Canada had revealed decibel readings much in excess of 90 dB on similar locomotives operated by another railroad. Our investigation also found that although the complainant did hunt during his holidays, he was not sufficiently exposed to high levels of noise to account for his hearing loss. Accordingly, the Temporary Ombudsman found that the Appeal Board's decision to grant entitlement to the complainant for an occupational hearing loss was not unreasonable.

The Workers' Compensation Board did not respond by letter; instead, a meeting was set up between Dr. E, Hearing Loss Claims, Dr. F, Director of the Medical Branch, and the Assistant Secretary of the Board, with an Assistant Director and the investigator, of my Office. This took place on September 30, 1983, at which time the Board made the following points.

- (1) The Board felt that as Dr. A was a pre-eminent specialist with the finely calibrated equipment of a large metropolitan hospital at his disposal, his or Dr. D's assessment of hearing loss should be accepted over all others.
- (2) Dr. E stated that presbycusis was consistent in its effect and that as one aged, one would necessarily be affected by it and therefore the Board's policy to consider this in its calculations was appropriate.
- (3) With regard to the matter of the pension for partial hearing loss of 30+ dB in one ear resulting from trauma, but nothing if the hearing loss was noise-induced and bilateral as long as the loss in both ears did not exceed 35 dB, the Board's position was that we did not have the medical expertise necessary to arrive at this opinion. Dr. E stated that there was a different kind of damage that could happen in the case of trauma, and that adjustment would be more difficult for the person with a traumatic hearing loss.

The investigator told the Board representatives that she had done extensive research and interviewing on this subject; none of the audiologists with whom she had talked had shared the Board's opinion, nor had Dr. A. Both Dr. F and Dr. E were of the opinion that if Dr. A were to say that a person with a bilateral loss of 30 dB would be more handicapped than a person with traumatic hearing loss of over 30 dB in one

ear, then the Board would reconsider its position. Accordingly, it was decided that our Office would write a letter to Dr. A asking him to examine the complainant and two other complainants in this regard.

Both our position and the Board's were put to Dr. A and his considered opinion on the following was sought:

Are Mr. [], Mr. [] and [the complainant] with their bilateral hearing losses apt to be as handicapped or more so than a person with normal hearing in one ear and a traumatic hearing loss of 30 dB plus (but less than 35 dB) in the other?

Another matter discussed in the letter was the deduction for presbycusis in the complainant's case. We asked Dr. A whether he thought it was possible or probable that the complainant would not suffer a decline in hearing due to aging over a four-year period.

Dr. A responded by way of a letter dated November 14, 1983. He responded to the first question as follows:

In general terms, the person with a 35/25 dB hearing loss is the more handicapped. If you note the Board's tables, they give a significant weighting to the better ear and a better ear of 25 dB loss is handicapping whereas a better ear of 0 dB loss is not. When the two ears are compounded together, the 25 dB loss in the better ear dominates the handicap rating. Therefore, I believe that all three claimants are more handicapped than your hypothetical person.

Dr. A also discussed the question of presbycusis deduction at some length:

Your question of presbycusis is a further contentious issue. The Board's removal of .5 dB for every year above the age of 60 is a significant improvement over their previous practice of removing .5 dB for every year above the age of 50. Nevertheless, it gives only a crude approximation to specific presbycusis corrections, the interpretation of which is always confounded by socioacusic, i.e. that hearing loss produced by living in a generally noisy environment apart from work.

I have frequently argued that there should not be a correction for presbycusis and, in particular, do not feel that presbycusis affects the frequencies 2kHz and below to a significant degree at the age of 60. Even at 3 kHz I have some difficulty in accepting that a person with otherwise normal hearing suffering only from presbycusis would not be handicapped while a similar person with an additional hearing loss from noise is handicapped, the difference surely being the noise exposure.

... However, in general terms, presbycusis does not affect all people equally. The tables which you provided are population norms. There are differences in this aspect of aging as in any other - some people are 70 years old, some are 70 years young, some have 70-year-old ears, some have 70-year-young ears.

It is possible that the complainant suffered no decline in hearing over a 4 year period from aging although at his age, it is not probable. By this I mean it is likely that he suffered some loss of hearing from age alone in a 4 year period between the ages of 63 and 67.

This response along with our original letter was forwarded to the Board for its consideration.

The Assistant Secretary of the Board notified my investigator in December of 1983 that Drs. E and F had certain representations they wished to make, but because of their technical nature, felt that the purpose could be best served during a meeting, preferably under the auspices of the new Ombudsman. Accordingly, a meeting was scheduled for March 22, 1984, with Dr. E, Dr. F, the Vice Chairman of Appeals, and the Assistant Secretary from the Board, and the Assistant Director, a counsel and the investigator from my Office.

During the meeting, Drs. E and F basically expanded upon their major points from the September meeting. That is, Dr. E gave detailed explanations for accepting audiological results from one large metropolitan hospital (where Drs. A and D practice) over any others. Dr. E also maintained her position that presbycusis affected everyone and referred our Office to research by two doctors who have written extensively on hearing loss and presbycusis deduction. Despite Dr. A's opinion, the Board continued to hold that traumatic hearing loss of 10+ dB in one ear would be more serious than bilateral hearing loss of approximately 35/25 dB and, again, stated that we did not have the medical expertise to make a decision in this matter.

I have reviewed all the information on file, considered the extensive research carried out by my staff and carefully noted the Board's representations.

In respect to the Board's position that audiological tests from a large metropolitan hospital should take precedence over all others, I am, as a general rule, persuaded that this is not an unreasonable position. The clinical setting and equipment at this hospital are acknowledged to be of the highest caliber. Audiologists at this hospital have tested over 6,500 Workers' Compensation Board hearing loss cases in the last 11 years; their work is exhaustive and complete. The Board does not have its own medical personnel to carry out hearing loss assessments as

it does for other disabilities. It seems only reasonable that the Board should seek and depend on expert testing for the purposes of pension assessment. Thus, I am not prepared to conclude that the Board was unreasonable to accept Dr. A's results over those of Drs. C and B when assessing the extent of the complainant's hearing loss.

In respect to deduction for presbycusis, I have reviewed the audiological studies by various authorities and it is apparent that no clear consensus exists. While I am impressed by Dr. A's reasoning, I cannot conclude that a compelling argument based solely on medical opinion against the general policy for presbycusis deductions exists. However, I am perturbed by the Board's decision to let general policy override specific evidence as presented in the complainant's case. In one article (supplied to my Office by the Board), the doctor states that "although not all older people are hard of hearing, losses can vary from zero to total deafness." The article concludes by stating that the degenerative processes of presbycusis vary greatly from one person to another. Thus, the .5 deduction for every year over 60 might, as Dr. F argued, be a comparatively generous reflection of the general deteriorating effects in older people. Nevertheless, given Dr. B's categorical statement that no additional hearing loss from presbycusis was present between 1977 and 1981 and taking into account that presbycusis does not affect everyone equally, I am of the opinion that in this case, the Board unreasonably fettered its discretion. That is, it stood by the general policy on presbycusis deduction even though the specific medical evidence concerning the complainant indicated that there was not additional loss. The Board's right to formulate policies is unquestioned; however, no policy should supersede the particular evidence in an individual case. Compensation is due the individual as he or she is uniquely affected, given the evidence available.

The last area of contention involves the Board's policy of allowing a 1% pension for a traumatic hearing loss of 30 dB plus in one ear and no hearing loss in the other, while not allowing a pension for noise-induced bilateral hearing loss of 35 dB plus in one ear but under 35 dB in the other. The Board has argued that these are two different clinical entities and that traumatic loss takes much more adaptation than gradual hearing loss.

I have seen no medical evidence to support this position in any of the medical texts researched. Dr. A's letter makes very clear that, in general, the traumatic hearing loss would not be as handicapping at this minimal level as would the bilateral noise-induced hearing loss. The Board has presented no information to substantiate its position and I can only be persuaded by the evidence available. I therefore conclude that the Board has unreasonably denied the complainant a pension as his hearing loss is beyond that which would make him eligible for a hearing-loss pension were he to be suffering from a traumatic hearing loss.

Lastly, I think it only appropriate to comment on my regret that the investigation of this case could not have been completed earlier. Essentially, the Board's position has not changed from its meeting with my staff in September of 1983. Yet, at that time, the Board representatives gave my staff to understand that were Dr. A's opinion to support the bilateral hearing loss question, then the Board would be significantly influenced and reconsider its position. However, it was apparent from the March meeting that, despite Dr. A's statements, the Board had not changed its position. While I do not question the Board's right to maintain a different position from that of my Office, I would prefer that the Board be candid about such differences and not hold out the possibility of reconciliation if none exists.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board's decision of October 21, 1981 was unreasonable in denying the complainant a pension for his hearing loss. It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Workers' Compensation Board should revoke its decision of the aforementioned date and award the complainant a pension for his occupational hearing loss. I also recommend that the presbycusis deduction should not be included when calculating the hearing loss.

I forwarded this report to the Chairman of the Board on August 22, 1984. On November 1, 1984, he wrote that the Board would be conducting an exhaustive review of its policy on hearing loss claims, the conclusions of which he would make known to me. Because of the review to be undertaken, the Chairman thought it would be premature to respond to individual recommendations. In a follow-up letter of February 4, 1985, I was informed that the review would not be finished until June 1985. Because I did not feel this complainant should be further prejudiced by having to attend the outcome of a general policy review, I sent a copy of my report to the Premier on March 7, 1985. The complainant was advised of the results of my investigation and the file was closed.

DETAILED SUMMARY NO. 13

This complaint against the Workers' Compensation Board was brought to the attention of this Office by a letter received on July 15, 1982 from the President of the Disabled Workers of Ontario. On behalf of the complainant, the President contended that the Appeal Board was unreasonable to deny the complainant entitlement to benefits for disabilities arising from various amputations on the basis of aggravation of Buerger's Disease which occurred in the course of his employment. In a decision dated November 20, 1981, the Appeal Board found that the complainant's disabilities were not causally related to his employment or to industrial accidents.

On August 12, 1982, the Chairman of the Workers' Compensation Board was notified of our intention to investigate the complaint, in accordance with the requirements of the Ombudsman Act. The Chairman was invited to make a statement, if he wished, of the Board's position in relation to the complaint. On behalf of the Chairman, a reply was received from the Assistant Secretary, stating that the Board did not wish to make a statement at that time. Following receipt of the letter, this complaint was assigned to a member of my investigative staff. During her investigation, the investigator conducted a thorough review of the complainant's Workers' Compensation Board claim file supplied by the Board, and carefully considered the relevant legislation, policy and practices of the Workers' Compensation Board in relation to the issue.

The original investigator subsequently left our Office and the complaint was then reassigned to another member of our investigative staff.

Our investigation has revealed that the complainant was employed as a carpenter by the first accident employer in 1964. On December 3, while being transported from one job site to another in an open truck, the complainant suffered frostbite to the toes of his right foot. On December 14, 1964, the complainant was assessed at a metropolitan hospital by Dr. A, who diagnosed "bilateral endarteritis obliterans" (Buerger's disease) and stated, "It is my opinion that this man has a disability which has been aggravated by previous pathology". The complainant's claim for Workers' Compensation Benefits was allowed on an aggravation basis only and he received temporary total disability benefits from December 24, 1964 to March 19, 1965.

Between 1964 and 1969, the complainant received benefits for two other incidents - one for medical aid only and one for a back injury. Neither injury involved an aggravation of Buerger's disease.

On October 21, 1969, while employed by another employer as a labourer, the complainant cut his left ring finger with a piece of metal. His finger subsequently became infected.

On October 24, 1969, three days after receiving the injury to his left ring finger, the complainant was working on a machine when the machine overflowed, soaking both his feet and his shoes in water. In a statement to the Board reported in Board memo number 31, the complainant said he was "constantly standing in this water which was always half an inch deep.... He was required to stand in this water most of the working day, as it was his job to mop up the water". At the end of his shift on October 24, he changed his socks but his feet felt hot and humid. The following day the complainant noticed a sore feeling around the little toe of his right foot. The complainant reported that he first consulted his family physician, Dr. B, on October 28, 1969 and continued to see Dr. B for three months for both his foot and his finger. In his report dated

November 6, 1970, Dr. B confirms that the complainant was treated for both his hand and foot conditions during October and November of 1969 and he lists twelve dates in those months on which the complainant was seen in his office.

The Workers' Compensation Board investigated the complainant's claim. Mr. J reported in November, 1970 that the foreman, plant Manager, and a co-worker confirmed that there was overflow from the machine. The Plant Manager stated that the overflow was alkaline soapy water. One co-worker, Mr. G, was quoted by the investigator as follows:

... on one occasion when the water overflowed from the machine, [the complainant's] shoes and feet got wet. The water got into his shoes. [the complainant] had complained to him [Mr. G] that his foot was sore and he [Mr. G] believes that it was in the small toe area.

The complainant was admitted to a metropolitan hospital on February 25, 1970 and was treated for both his finger and foot problems. He was discharged one month later but his condition worsened and finally the distal phalanx of his left ring finger was amputated on June 3, 1970. Dr. C, a plastic surgeon, diagnosed "chronic fungus osteomyelitis". The wound did not heal properly, and the complainant returned to the hospital with a "dreadful wound infection" requiring further amputation. As well, his right fifth toe condition worsened. In a medical report dated August 28, 1970, Dr. D, an orthopaedic surgeon, noted:

This 39 year old man apparently scratched his toe at work although I could not get any clear details. He states he was working in some water and he thinks he injured his toe inside his shoe in some way.... He tells me that when he went to his place of work to try and get them to give him papers for compensation, he was laid off immediately and therefore has been unable to submit a claim to the Workmen's Compensation Board.

... on examination he has an obvious discharge from the medial aspect of the fifth toe and pain with any movement.... X-rays revealed a lytic area in the proximal phalanx right into the joint. In fact, this looks look like an osteomyelitis.

Dr. D performed an amputation of the proximal phalanx of the right fifth toe at a metropolitan hospital on September 9, 1970. Following the operation, Dr. E of the department of radiology at another hospital reported:

A.P., oblique and lateral views were made of the right fifth toe. Erosion of the head of [the] proximal phalanx is noted. Some subluxation of the proximal and mid phalanges is also seen. Very likely the above mentioned finding is traumatic in nature.

Again, the wound failed to heal and a further amputation was performed by Dr. D on October 14, 1970.

The Workers' Compensation Board denied entitlement for both the finger and foot claims initially. In a letter to the complainant dated November 30, 1970, a Claims Officer noted that "... it has not been shown that the disability was the result of an accident in the employment... and it has not been shown that the disabilities for which you were treated were the result of the incidents that you have described". The Claims Officer stated that the Board's investigation failed to disclose any supervisors or fellow workers who could confirm the history related by the complainant, nor could the employer confirm his story about the events of October 24, 1969. The Claims Review Committee decided in January, 1971 that entitlement to benefits was not established for the finger or the foot.

An Appeal Tribunal hearing held March 19, 1971 dealt only with the issue of entitlement for the left ring finger and granted the complainant's appeal. The Tribunal found that "the injury to the complainant's left ring finger was caused by [an] accident arising out of and in the course of employment on October 21, 1969". The Tribunal noted that, "The reporting to and witnessing of the accident was confirmed by the foreman, who was present at the hearing. The foreman also said that the workman had complained of burning his right foot with an alkali solution about the same time".

The complainant received benefits for laceration, osteomyelitis, and the amputation of the finger from October 28, 1969 to August 1, 1970. In September, 1972 he was awarded a permanent disability pension of 2.4% for the amputation and received a lump sum payment of \$1,925.

A second Appeal Tribunal hearing was held September 15, 1971 with respect to the issue of entitlement for the complainant's right foot disability. The Appeal Tribunal noted that although the infection was first noticed a couple of days after the water episode, there was nothing to show that this infection was either caused or aggravated by the water. The Tribunal denied the appeal since it was not satisfied that the complainant's disability was in any way work-induced.

After undergoing several other amputations, the complainant again applied to the Workers' Compensation Board in 1978 for benefits,

including benefits for his right fifth toe amputation. The matter was referred to Dr. H, the Board's Surgical consultant, who noted in a memo dated July 16, 1979 as follows:

I have reviewed all the information on this man's four files... it establishes beyond a doubt in my mind that this man suffers from a condition known as Buerger's disease which is a progressive problem of unknown causation leading to obliteration of the arterial supply in the four limbs. This condition is not a compensable matter at all.

In a medical report dated December 4, 1978, Dr. B, who had treated the complainant since the frostbite incident in 1964, reported to the complainant's lawyer as follows:

... the complainant suffers from Buerger's disease or what is called arteriosclerosis obliterans. The exact cause of this disease is not known but it is certain that exposure to cold and damp weather markedly aggravates its symptoms and signs. It involves mainly the limbs especially the peripheral parts of them and there is an ongoing obliterative thrombotic inflammatory process of non-infectious origin going on involving mainly the smaller arteries as well as the veins at times.... his condition at least if not created by his employment was markedly aggravated by it and brought into surface by his type of work as I described above.

The Appeal Board decision dated November 20, 1981 denied the complainant's claim for entitlement for further amputations to his left leg and right and left hands as well as the amputation of his right fifth toe. With regard to the right fifth toe, the Board noted that "evidence does not establish that the work activities and exposure on October 24, 1969 initiated or aggravated the underlying disease".

When the complainant contacted our Office in July 1982, we wrote to Dr. F, a leading authority on Buerger's disease, and asked for his opinion of the medical information on file. He stated on April 13, 1983 that:

... The etiology of Buerger's disease seems to be related to smoking, familial history and other chemical factors that we may or may not understand. These chemical factors could be working at his plant although I am not aware of any specific factors that would cause this problem.

Any cut or scratch on an extremity which is involved with Buerger's disease can and will lead to a lack of healing of these sores and eventual necessity for care. Very often

procedures to improve blood supply into the area do not improve the situation and the patient eventually goes on to local amputations.

Clearly cold does aggravate Buerger's disease. Clearly a cut or scrape on an extremity that is known to have Buerger's disease will get worse....

Our Office then narrowed the issue to the question of compensation for the complainant's right fifth toe. We wrote again to Dr. F, outlining the events of October 24, 1969. His reply, dated November 7, 1983 stated:

Certainly the wet water and chemical irritants in the water could cause problems, but most likely this man had wet shoes and his toes would rub in the shoes and because of the softening of the shoe he would develop an ulcer.... If... he was not knowledgeable and he did not know how to protect himself against injury and did not understand that he [sic] was a potential for severe damage to his feet, then I would agree with you that he himself did have an amputation subsequent to working conditions.... However, [the] events which you describe obviously did lead to this man's problem.

We forwarded Dr. F's second report to the Board and Dr. H was asked by the Appeal Board to review the file in order to give his opinion on compensation. Although he noted Dr. B's letter of November 6, 1970 indicating that the complainant was treated for his right fifth toe problem in October and November 1969, Dr. H concluded that:

In the absence of any documentation dated between late October of 1969 and February of 1970 concerning the toe and its stated causation, I feel that the claimed association is wholly speculative.

Dr. H concluded that the two primary causes for the amputation of the toe were "firstly the significant impairment of blood supply due to the Buerger's disease and secondly the problem in the interdigital cleft between the 4th and the 5th toe defined above which under circumstances of decreased vascularity tends to progress and become significant". He concluded that the lack of medical evidence between October, 1969 and February, 1970 and "... the undoubted fact that the causation of his toe problem is very adequately explained by other pathology, I cannot recommend that the Appeal Board reconsider their decision".

On the basis of the information available, I set out the following tentative conclusion and recommendation in my letter to the

Workers' Compensation Board dated August 1, 1984, written pursuant to section 19(3) of the Ombudsman Act:

Possible Conclusion:

The Appeal Board unreasonably denied entitlement for the injury to the complainant's right fifth toe. [Reference: Ombudsman Act, section 22(1)(b)]

Possible Recommendation:

The Appeal Board should vary its decision and award the complainant benefits in accordance with its policy on non-measurable pre-existing conditions. [Reference: Ombudsman Act, section 22(3)(c) and (g)]

This possible conclusion and recommendation were based on the above information and on the following concerns:

A. Medical Evidence:

The medical evidence indicates that, prior to 1964, the Buerger's disease was asymptomatic. Following the frostbite incident on December 3, 1964, the complainant's disease manifested itself and was diagnosed. There were no other manifestations until 1969, when the complainant cut his left ring finger and suffered an ulcer between his toes as a result of wet feet.

The medical evidence indicates that the complainant saw his family doctor, Dr. B, frequently during October and November of 1969 and that Dr. B treated him for both his finger and his foot problems. Dr. D's report of August, 1970, confirms that the complainant related his foot injury to the water incident.

Dr. F gave as his opinion that although Buerger's disease is not caused by any particular occupation, it is aggravated by symptoms of cold and wet and by chemical trauma. The disease is episodic and Dr. F notes that a cut or scratch to an extremity could very likely result in amputation. The complainant was exposed to alkaline soapy water which overflowed from the machines, which could possibly result in chemical trauma to someone with Buerger's disease who is sensitized. The complainant was not wearing protective equipment; no prophylactic measures were used, nor was the complainant instructed to use them. Dr. F, in his second report, states that in those circumstances, he would agree that the complainant did have an amputation subsequent to working conditions.

The Appeal Board relied on the opinion of its surgical consultant, Dr. H, who felt that Buerger's disease is a progressive vascular problem, and therefore any disability suffered by the complainant was as a result of the slow progression of his disease combined with other pathology. It is difficult to understand why the Board granted the complainant entitlement for his finger disability but not for his foot disability when, in each case, Buerger's disease was the underlying problem and the diagnosis in each case was osteomyelitis.

B. Disability Arising Out of Employment:

The Appeal Board found that the complainant's work activities and exposure on October 24, 1969 did not aggravate his underlying disease. However, there was evidence from the complainant's foreman and a co-worker which confirmed that there was overflow of water from the machines, that the complainant's job involved cleaning up this overflow, that the overflow was an alkaline soapy water, and that it was possible for the complainant's feet to become wet. The foreman testified before the Appeal Tribunal that he did recall the complainant complaining of burning his right foot with an alkali solution about the time he received his finger injury and the co-worker, Mr. G, confirmed that there was one occasion when the complainant's feet became wet. Dr. F's second medical report indicates that an alkaline soapy water could provide the chemical trauma necessary to aggravate Buerger's disease. The existence of Buerger's disease means that a very minor injury to an extremity will lead to serious complications, including local amputation. This is the course the complainant's injury followed. As well, the complainant's finger injury is an indication of the type of reaction common to Buerger's disease, and the Appeal Board compensated him for that injury.

C. Board Policy:

The Board's policy on non-measurable pre-existing conditions indicates that an injured employee's entitlement would not be reduced due to any pre-existing condition provided the condition is shown not to have been disabling prior to the compensable injury. There is no evidence that the complainant's pre-existing disease disabled him prior to the injury in 1969 with the exception of the 1964 frostbite incident, when the disease was first diagnosed. He returned to work and he worked steadily until 1969.

On the basis of the evidence, the complainant may be entitled to benefits on an aggravation basis and that he may be entitled to the total assessment because his pre-accident disability was minor and not disabling.

The Chairman responded to the possible conclusion and recommendation in a letter dated September 28, 1984 in which he wrote that:

The issue in this case appears to be whether or not an incident on October 24, 1969 could have led to the eventual amputation of the complainant's right fifth toe. The panel understands your position in the matter to be, tentatively, that the report of Dr. F provides a medical basis upon which the panel should have found that the underlying non-compensable Buerger's disease was aggravated by the events on October 24, 1969 and that the subsequent amputation was therefore compensable.

Careful examination of Dr. F's report of November 7, 1983 reveals the following:

1. In response to the question "is it likely the complainant's condition (diagnosed in 1964 as Buerger's disease) was aggravated by the incident of October 24, 1969?", Dr. F replies:

"Certainly the wet water and chemical irritants in the water could cause problems, but most likely this man had wet shoes and his toes would rub in the shoes and because of the softening of the shoe he would develop an ulcer". (emphasis added)

First of all, the doctor's use of the word "could", rather than "likely" or "probable", suggests to the Appeal Board that he concedes only the possibility that wet water and chemical irritants would have caused the subsequent problems. Secondly, the evidence implies that it was not unusual for the complainant to have wet feet, in that he was always standing in approximately one-half inch of water. Thirdly, the Appeal Board did not accept, as Dr. F appears to have done, that the softening of the shoe would have caused an increase in friction. If anything, the opposite is likely to occur. Lastly, Dr. F's opinion appears based on the premise that the complainant developed an ulcer at that time. There is no evidence to support this in fact.

2. While Dr. F appears to be unequivocal when he states that "the events which you describe obviously did lead to this man's problem", he seems equally unequivocal in his report of April 14, 1983 when he states:

"in the first instance I would like to state that Buerger's Disease has no relationship to this patient's problem with working injuries".

3. The question of whether the alkali in the water was present to a degree sufficient to create an irritant effect, has never been established.

For the above reasons, the Appeal Board could not agree that the information submitted by Dr. F was conclusive, or that it should be preferred over the evidence of Dr. H.

In respect of the points made under the heading "Disability Arising Out of Employment" on Page 7 of your letter, it is interesting that the co-worker could confirm that there was "one occasion when the complainant's feet became wet", as opposed to the suggestion in your letter that his feet were constantly wet. The reference to the complainant's finger injury is also of significance, in that the finger injury was actually a cut and clearly falls within the definition of "accident". The disability involving the complainant's right fifth toe hinges on the application of Section 1(1)(a)(iii) of the Act and in order to be accepted, it would have to be established that there was something about the work which was reasonable to consider had caused the disablement. In this case, the Appeal Board is of the view that one can only speculate that wet feet, or exposure to soapy water with some alkaline content would have given rise to the eventual amputation.

With respect to the comments made under "Board Policy" on Page 7 of your letter, the Appeal Board points out that this policy is applicable only after entitlement is accepted. It is not used or applied in the process of determining whether or not an injury or disability is compensable in the first place.

In considering this case, the Appeal Board was not without sympathy for the complainant's unfortunate circumstances. That the Board recognizes the impact or aggravating effect of employment incidents on his Buerger's disease is, I believe, reflected in the fact that the Board has accepted his condition

on an aggravation basis for both the finger injury and the frostbite in 1964. Unfortunately, the disability involving the right fifth toe has not, in the Appeal Board's view, been established as a consequence of the employment in the same way as the other two claims, and under the circumstances the Appeal Board cannot agree that its decision was unreasonable.

In view of all of the above, the Appeal Board will not implement your tentative recommendation.

I have now had the opportunity to consider carefully all the factors involved, including the Board's response to my letter dated August 1, 1984.

The Chairman's letter raises three points. Point 1 refers to Dr. F's report of November 7, 1983. I feel it is clear on the face of the report that Dr. F was stating his opinion that either the water or the friction from the complainant's wet shoes resulted in his condition. Both of these events occurred in the course of his employment, and resulted in the soreness that eventually led to the amputation of his toe.

Point 2 quotes from Dr. F's earlier report of April 13, 1983. I point out that that report was made before we narrowed our investigation to the question of entitlement for the amputation of the complainant's right fifth toe and before Dr. F had all the facts before him relating to that incident. This was pointed out to the Board in a letter from our Office dated November 25, 1983. Thus, Dr. F's second report is the pertinent one with regard to the toe disability.

Point 3 raises the question of the degree of alkali in the water and whether it was sufficient to create an irritant effect. I agree that the degree of alkali was not established. I point out, however, that Dr. F is the leading Canadian expert on Buerger's Disease and his response was based on information from us that "The plant manager confirmed that it was alkaline soapy water..." that soaked the complainant's feet. I, therefore, am of the opinion that the degree of alkali is not the determinative issue.

The Appeal Board's conclusion, as set out by the Chairman at page 2 of his letter, is that the information from Dr. F was not conclusive and should not be preferred over that of Dr. H. I point out that, not only is Dr. F an expert in this area, but he has been treating the complainant for some time and is familiar with his case. Dr. H is trained in general surgery and has not treated the complainant.

With regard to the question of entitlement for a disability arising out of employment, the Chairman notes that our earlier report suggested the complainant's feet were constantly wet. I refer to page 2,

paragraph 5 of my August 1, 1984 letter, in which the complainant is quoted as stating that he was "constantly standing in this water..." (emphasis added). The complainant wore steel-toed work boots and, although it was his job to mop up the overflow of water, his feet became wet on this one occasion only. Thus, this incident occurred while he was at work, performing the duties of his employment.

The Chairman also refers to the application of section 1(1)(a) (iii) of the Workers' Compensation Act, which states that "accident" includes disablement arising out of and in the course of employment. The Chairman states that it must be established that there was something about the work which was reasonable to consider had caused the disablement, in order for this section to be applied to the complainant. The Appeal Board feels one can only "speculate" that wet feet, or exposure to soapy water with some alkaline content, would have given rise to eventual amputation. I, however, rely on the November 7, 1983 report of Dr. F referred to earlier in the Chairman's letter, wherein Dr. F states:

Certainly the wet water and chemical irritants in the water could cause problems ... If ... [referring to the information in our letter dated August 8, 1983] he was not knowledgeable and he did not know how to protect himself against injury and did not understand that there was a potential for severe damage to his feet, then I would agree with you that he himself did have an amputation subsequent to working conditions.... The events which you describe obviously did lead to this man's problem.

The interpretation of Board policy raised on page 3 of the Chairman's letter should be clarified. I rely on the application of the Workers' Compensation Board "Board Policies and Administrative Directives", section 108(2) Directive 1 re: Application of the policy on aggravation of pre-existing conditions, to determine entitlement for the complainant. The section states:

The policy on aggravation of pre-existing conditions applies to both Schedule I and Schedule II claims in which:

- (1) a relationship is shown between an underlying condition and the degree of disability arising from the accident; and
- (2) The period of treatment and recuperation is prolonged due to an underlying condition; and/or
- (3) an increased degree of residual disability occurs over that usually found in such cases owing to the underlying condition.

I then rely on the application of the Workers' Compensation Board Claims Adjudication Branch Procedures Manual, Document 33/02/20, page 4, on Non-Measurable Prior Conditions, section a(i) to recommend that the complainant should be granted the total assessment once his entitlement is determined.

The Chairman's penultimate paragraph states that the incident involving the complainant's right fifth toe is distinguishable from the incidents of frostbite and the injury to his left ring finger for which he was compensated. I understand the Chairman's position to be that the two compensable injuries were "accidents" in that they were traumatic incidents. The injury to the complainant's right fifth toe is also an "accident" within the definition of section 1(a)(iii) of the Workers' Compensation Act, in that it is a disability arising out of his employment. In my view, the Workers' Compensation Act requires compensation equally for traumatic and for disabling "accidents". I am simply requesting that the Appeal Board decide this case in accordance with the governing Act and its own policies.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of July 24, 1980 was unreasonable to deny entitlement for the injury to the complainant's right fifth toe.

It is therefore my recommendation, pursuant to section 22(3)(c) and (g), that the Appeal Board vary its decision and grant the complainant entitlement for the disability resulting from the amputation of his right fifth toe.

This recommendation was included in a report to the Chairman dated January 11, 1985.

The Board had not responded to the report and recommendation by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 14

This complaint was received at this Office on February 9, 1983. The complaint was against a decision of the Appeal Board of the Workers' Compensation Board dated December 17, 1982. The complainant contended that his back disability arose out of and in the course of his employment. The Appeal Board, in its decision, concluded that the complainant's contention was unfounded.

On April 12, 1983, the Chairman of the Workers' Compensation Board was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complainant's complaint. The Chairman was invited to make a statement of the Board's position.

On April 26, 1983, the Assistant Secretary to the Board responded on the Chairman's behalf by stating that the Board did not wish to make a statement at that time.

This complaint was assigned to a member of my investigative staff who thoroughly reviewed the complainant's Workers' Compensation Board claim file supplied by the Board and considered the relevant legislation and Board policy in relation to the issue.

Our investigation revealed that the complainant experienced a sudden onset of low back pain on January 19, 1981, while performing his regular duties as a crane operator. The complainant had been a crane operator for approximately 15 years prior to January 19, 1981, and primarily worked on crane #113. The complainant advised the Board, the accident employer and our Office that the crane in question is a fairly old piece of machinery, subject to a great deal of jarring and bumping, and that the brake pedal is extremely stiff. He added that the constant operation of the brake pedal caused pain in his leg which radiated into his back.

As the basis for its denial of the complainant's claim, the Appeal Board noted and accepted that the complainant had first experienced back discomfort while gardening in the summer of 1980, some six months prior to the January 19, 1981 incident. The Appeal Board further noted that for a number of years, the complainant had operated crane #113 without any apparent difficulty. When the complainant laid off work in March 1981, he claimed sickness and accident benefits through his employer's insurance plan; it was not until May, 1981 that the complainant claimed Workers' Compensation Board benefits. The Appeal Board did not accept as plausible the complainant's explanations for this delay.

During the course of this Office's investigation, I reached the tentative conclusion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of December 17, 1982, which found that the complainant's back disability did not arise out and in the course of his employment, was unreasonable. My tentative conclusion was set out in my letter of March 23, 1984, addressed to the Chairman, and sent pursuant to section 19(3) of the Ombudsman Act. In addition, my letter was sent to the accident employer.

In my letter of March 23, 1984, I supported my tentative conclusion by pointing out that prior to January 19, 1981 the complainant

had not sought medical attention for back pain, nor had he lost time from work because of this pain. It appeared to me that the complainant's periods of back pain prior to January 19, 1981 were minor in nature, and not a sound basis upon which to deny him entitlement for a back condition subsequent to January of 1981.

I noted in support of the complainant's contention that he experienced unusual difficulty operating crane #113.

In support of the complainant's explanations that he did not make an immediate Workers' Compensation Board claim because he did not initially consider his injury serious, I pointed to the November 27, 1981 report from the complainant's general surgeon, Dr. A. In his report, Dr. A stated that on January 23, 1981 when he first saw the complainant in connection with back pain relating to the January 19, 1981 incident, he advised the complainant to seek Workers' Compensation Board benefits. The complainant, however, was optimistic that the disability would resolve itself without causing loss of work.

Dr. B, the orthopaedic surgeon treating the complainant, reported to the Workers' Compensation Board that in his opinion, the complainant's explanation was "... plausible when one considers the difficulty with which the Board claims are settled as opposed to those of the insurance claims...."

In my letter I noted that the medical opinions expressed by Drs. A and B as to the origin of the complainant's back disability indicated that it was his work on the rough-riding crane #113 that aggravated his pre-existing degenerative disc disease. I indicated that I felt the opinions of these independent specialists would seem to bear more weight than the opinion of the Workers' Compensation Board Medical Adviser, which did not support a relationship of the complainant's back disability to his work.

I concluded by stating that, "... With a diagnosis of degenerative disc disease in mind, it would appear that the complainant's disablement was an aggravation of his pre-existing degenerative disc disease, and should be allowed as such...."

I therefore tentatively recommended, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision dated December 17, 1982 and grant the complainant entitlement to compensation benefits on the basis of an aggravation of pre-existing degenerative disc disease, arising out of and in the course of his employment.

By letter of April 11, 1984, the employer's Employee Relations Assistant responded by stating, in part:

... It is our understanding that the Workers' Compensation Act, when amended in 1963 to include "Disablement, arising out of and in the course of employment", does not replace or interfere with the basic premise of evidence of causation rather than the mere physical presence of a worker at the work place at the time of the development or onset of pain or disablement.... It would be unreasonable to revoke the Board's decision of 1982 12 17.

The Chairman responded to my letter on June 28, 1984, and indicated that in order for an accident to be considered as disablement arising out of and in the course of employment, as outlined in section 1(1)(a)(iii) of the Workers' Compensation Act, there must be something about the work that caused the disablement to occur. The Chairman stated that the Appeal Board was not able to identify that "something". The Chairman added that the complainant and the attending physicians all had similar difficulties in relating the back problems to "something about the work".

The Chairman noted that when the complainant was contacted by a member of the Board's Adjudication staff on June 23, 1981, the complainant did not relate the cause of his back problems to a specific incident but to his work as a crane operator in general. The Chairman also noted that on the complainant's report of accident dated August 17, 1981, the complainant did not indicate a specific incident but considered that it was his work in general which caused his back pain. A further conversation with the complainant by a member of the Board's Adjudication staff in September of 1981 revealed that the complainant did not attribute his disability to a specific incident but to his employment as a crane operator over the years. The Chairman also noted that there was no mention of a stiff brake pedal as being the source of his problems during these contacts.

The Chairman then noted that Drs. A and B did not identify any specific work-related event to account for the onset of back pain and indicated that their opinions which support the relationship of the back pain to the employment were made "... well after the fact...." The Chairman's letter went on to state:

... With respect to Dr. A, it would hardly appear that the doctor is impartial in the matter, as indicated by the following extract from his report of November 27, 1981. In this letter Dr. A seems to take issue with a letter sent by one of the Board's staff to his former address.

. . . .

Dr. A goes on to state that "As far as I can recall he first felt pain in his lower back while actively carrying out his routine work...". Obviously, this is not correct as the complainant told both the Board's staff and Dr. B that his back problems started several months prior to the January 1981 onset. Furthermore, it seems somewhat misleading for Dr. A to say that "I first saw the complainant for his back disability on Jan. 23/81", since, according to the complainant, he saw Dr. A on that occasion because of his cardiac problem. The complaint of back pain was mentioned incidental to the primary purpose of the visit.

Your letter refers to Dr. A's report of November 27, 1981 and Dr. B's report of November 8, 1982, as supporting the complainant's explanation for not claiming compensation immediately. Dr. B's comments are general, and are not attributed to anything the complainant may have said to him concerning the delay. Notwithstanding Dr. A's observations, the Appeal Board finds it difficult to accept that in March 1981, when his disability had become so severe that he could no longer work, the complainant claimed sickness and accident benefits because he did not consider his condition to be serious. That is why the Appeal Board did not consider his explanation "plausible" and the comments made by Drs. A and B do nothing to dissuade the Appeal Board from that view.

Regarding the statements of the co-workers as to the operation of crane #113, the Chairman indicated agreement with the accident employer that these co-workers were not in a position to comment on the operation of this crane or any ensuing disability as they were not familiar with this crane. The Chairman's letter concluded by stating:

... In any event, the Appeal Board considers the condition of the crane to be less relevant than the fact that the complainant had operated this unit for 14 years without any recorded complaint of difficulties. This being the case, it cannot be said that for the complainant, there was anything unusual about the crane in which he worked, to account for his back disability.

The Appeal Board does not dispute that the complainant may have experienced back pain at work in January of 1981. Furthermore, the Appeal Board does not dispute that there may have been some mechanical or operational difficulties in crane #113. However, it requires more than the mere existence of these factors to bring a worker within the parameters of the Workers' Compensation Act. In the Appeal Board's view it has not been established that the complainant's disability arose out of and

in the course of his employment, nor has it been established that there was anything about the work which could reasonably be considered to have caused the disablement to come on. Accordingly, the Appeal Board cannot agree that its decision of December 17, 1982 was unreasonable, and consequently, no action will be taken in terms of implementing your tentative recommendation.

I have carefully considered the submissions made by the Workers' Compensation Board and the accident employer, and in addressing myself to these submissions I would like to note the following points.

1) Entitlement Under Section 1(1)(a)(iii) of the Workers' Compensation Act

I confirm that the complainant's disability should be considered as disablement arising out of and in the course of his employment under the above-noted section of the Workers' Compensation Act, and in support of this I note Directive II of the Board Policies and Administrative Directives, which states:

Entitlement under the amending Act applying to accidents happening on and after the 3rd of April, 1963, which includes under the definition of accident "disablement arising out of and in the course of employment" requires that the disablement which the employee suffers must have some causal relationship with the work being performed, that is, it is not sufficient that the disablement comes on during work, but rather there must be something about the work which can be considered to have caused the disablement to come on, such as strenuous work, awkward position, unaccustomed strain, or even a movement arising out of the work which is reasonable to consider has caused the disablement.

The "something" about the work to cause this disablement was the jarring and bumping of the crane and the movements required and experienced in the operation of the crane.

In his June 23, 1981 statement to one of the Board's Adjudication staff and in his August 17, 1981 report of accident, the complainant attributed the aggravation of his degenerative disc disease to the general nature of his work and the movement of the crane. That the complainant could not "attribute his disability to anything specific in his employment" does not appear to rule out entitlement according to the Workers' Compensation Board policy on disablement, as an aggravation of a pre-existing condition.

2) Medical Evidence

The Chairman's letter attributed a great deal of significance to the complainant's complaints of back problems prior to January 19, 1981, yet there is no record of lost time or medical attention for these complaints. As there is no apparent continuity relating these back problems to the January 19, 1981 onset of pain, this would not appear to be a sound basis for denying the claim.

The Chairman in his letter indicates that the opinions of Drs. A and B were made "well after the fact", and he questions the impartiality of Dr. A. Both independent specialists are firm in their belief that the complainant's degenerative disc disease was aggravated by the general nature of his work. Dr. A stated that the complainant's "... back pain was caused by and aggravated by his work..." and in documenting his treatment from January 23, 1981 he does not demonstrate any ambiguity in this opinion.

To consider Dr. A's unfortunate comment regarding a letter from the Workers' Compensation Board which he stated was probably never sent as an indication of his lack of impartiality in this matter, is to question his professionalism. Similarly, I cannot agree that Dr. A was misleading when he stated that he "first saw the complainant for his back disability on Jan. 23-81". In a report dated June 16, 1982, Dr. A stated "... my records clearly and unequivocally show that on Jan. 23/81 the complainant came to see me specifically and primarily regarding low back pain...."

Dr. B did not identify a source for the complainant's disabling back pain until our Office requested a clarification. He was of the opinion that the complainant's work was the cause of his disability, and I cannot appreciate how this opinion can be discounted simply because of the date that it surfaced.

3) Delay in Reporting

Although the Board does not accept the complainant's explanation regarding his delay in claiming compensation benefits, the complainant has indicated that he did not anticipate as lengthy a period of disability as occurred. Once he realized it would not be resolved over the short term, he accepted the initial advice of Dr. A and claimed compensation benefits.

4) Operation of the Crane

While the Board does not dispute that the complainant experienced back pain in January of 1981 while at work, or that there may have been some mechanical operational difficulties with crane #113, it does

dispute that the disability arose out of and in the course of employment and stated that it has not "been established that there was anything about the work which could reasonably be considered to have caused the disablement to come on".

That the crane was particularly difficult to operate is referred to by the statements of co-workers. While the employer disputes the relevancy of these statements, the Workers' Compensation Board has accepted that some mechanical and operational difficulties may have been associated with crane #113.

While the complainant's disability is not attributed to one specific action, it is attributed to his work in general, which involved awkward positions and constant use of jarring equipment.

Summation

The aggravation of a pre-existing condition is supported by the opinions of Drs. A and B. Given the Workers' Compensation Board policy outlining the definition of disablement, the complainant's disability would appear to be allowable on this basis.

The Chairman's response appears to place a heavy burden of proof on the complainant and reflects great doubt as to all of the evidence that supports his claim. In my view, the consensus of medical opinion supports a causal relationship between the disablement the complainant suffered and the work he was performing.

It is therefore my opinion pursuant to section 22(1)(b) of the Ombudsman Act, that it was unreasonable of the Appeal Board to conclude that the complainant's disablement did not arise out of and in the course of his employment. I recommend, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision dated December 17, 1982 and grant the complainant entitlement to compensation benefits on the basis of an aggravation of pre-existing degenerative disc disease, arising out of and in the course of his employment.

My conclusion and recommendation were reported to the Chairman and the Minister of Labour on November 28, 1984. The Chairman responded on March 20, 1985, and advised me that he was not prepared to implement my recommendation. In the absence of something unusual about the work, the Board was satisfied that section 1(1)(a)(iii) of the Workers' Compensation Act did not apply.

I am of the view that this was not an adequate or an appropriate response to my recommendation, and notified the Premier of my findings on March 31, 1985. The complainant was also advised of the results of my investigation and the file was closed.

DETAILED SUMMARY NO. 15

This complaint against the Workers' Compensation Board was registered with this Office in a letter dated September 26, 1983 from the complainant's lawyer. The complainant advised that she was dissatisfied with Appeal Board decisions dated February 2, 1981 and May 27, 1983.

On October 20, 1983, the Chairman of the Workers' Compensation Board, was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint, which was summarized as follows:

(1) That the Appeal Board, in its decision dated February 2, 1981, was unreasonable to deny that personal injury by accident arising out of and in the course of her employment has not been established; and,

(2) that the Appeal Board in its decision dated May 27, 1983 was unreasonable to find that the reports of [Dr. A] and [Dr. B] did not contain evidence which would cause the Appeal Board to vary, amend or revoke its decision of February 2, 1981 nor to grant a new hearing.

The Chairman was also asked if he wished to provide a statement of the Board's position. In a response dated November 10, 1983, the Board declined to make a statement at that time.

Our file on this complaint was then assigned to a member of our investigative staff, who thoroughly reviewed the Workers' Compensation Board claim file supplied by the Board and discussed the complaint with the complainant over the telephone.

Our investigation has revealed that on January 29, 1980 the complainant, a seamstress, was seated at a sewing table across from a co-worker when an 8-foot fluorescent light fixture with two bulbs crashed down, showering her with white powder. She looked across the table to find her co-worker on the floor, bleeding from the head. The injured co-worker received compensation benefits. The complainant described the incident at an Appeals Adjudicator hearing on June 17, 1980:

I see this friend - scream and come for help and I see the blood come from the head and eyes, and come from the nose, it go down - scream - scream, I think maybe the lamp fall in the head and break the head.

A co-worker described the incident at an Appeal Board hearing on November 13, 1980:

I stood there like most people and watched these lights fall and there was a lot of screaming going on and after they had fallen there was like a period where there was dead silence and then one lady was screaming and no one knew where she was and that's when I ran over to find out where the screaming had come from, and the one woman who was injured was under the coatrack by her sewing machine, or her table, and then a lot of other people had run over and tried to drag her out from underneath, and she was screaming and there was blood all over her....

The complainant was shaken by the experience, describing her reaction as a feeling of shock. She could not speak and she could not walk without assistance. Her family physician, Dr. C, diagnosed acute nervous tension. It was Dr. C's opinion that no time off was warranted and that the complainant's condition was not work-related. The complainant returned to her job on February 4 and worked for three days with increasing anxiety. She laid off work February 7, 1980 and claimed compensation benefits.

Dr. H of the Board recommended rejection of benefits on February 15, 1980 on the basis that the accident had "no psychopathogenic qualities".

On April 18, 1980, Dr. D, an otolaryngologist, seeing the complainant for tinnitus, noted an anxiety reaction and her comment that she was almost going crazy.

On April 24, 1980 the complainant's claim was rejected on the basis that she was witness to an accident but did not suffer any physical injury, and that her physician felt that no lost time from work was warranted.

On June 27, 1980 Dr. C spoke to a Workers' Compensation Board investigator and reported that she had suggested that the complainant see a psychiatrist in 1978.

On August 19, 1980 the Appeals Adjudicator denied the complainant's claim on the basis that the accident was not of sufficiently traumatic nature to cause her symptomatology, that she had experienced similar problems in the past, and that her acute nervous tension did not arise out of or in the course of her employment.

Dr. E, an otolaryngologist, saw the complainant on August 27, 1980 and described her as very depressed. He also noted that when he saw her in 1973, she complained of the feeling that she might go crazy.

Dr. F, a psychiatrist, saw the complainant on September 22, 1980, October 1, 1980 and October 16, 1980. He reported that the

complainant complained of fearfulness, weakness, an echo in her ears, dizziness, sleep disturbance, feeling hot, and occasional nausea and vomiting, dating back to the accident of January 29, 1980. Dr. F felt that she might have been suffering anxiety and depression for some years. He neither diagnosed the complainant's condition nor described its etiology.

The Appeal Board concluded on February 2, 1981 that the complainant was a witness to but was not involved in the accident of January 29, 1980, and denied her appeal.

On February 5, 1981 the complainant was examined by Dr. G, an otolaryngologist. He noted an "apparent persistent depression".

Dr. B, a psychiatrist, saw the complainant in September 1981 and May 1982. In a report to the Workers' Compensation Board on June 28, 1982 he wrote:

The presenting problems were the complainant's feelings of sadness and hopelessness, her basic anxiety about leaving her house and participating in social activities, a lack of energy and interest in people and events around her, difficulty in performing simple household tasks and problems with her sleep. In addition, she presented a collection of vague, bothersome physical complaints including numbness in her arms and legs, headaches and hearing problems.

She had also noticed that her appetite was down. She had lost 30 pounds in weight. She had been unable to participate in family activities, where her functioning was well below the level it had been prior to the onset of the problems and she had much less confidence in herself. During this period, she had been unable to work due to her anxiety, depressed feelings and tearfulness and her lack of self-confidence.

He wrote further:

There is little doubt in my mind that the current problems were not an exacerbation of an underlying process or an inevitable event in the life of this lady. I feel they were directly contributed to by the accident at work, in conjunction with the failure to find appropriate treatment immediately afterwards.

His diagnosis, according to the American Medical Association's Diagnostic and Statistical Manual III criteria, was Adjustment Disorder with Mixed Emotional Features. Dr. B noted that the complainant had responded well to anti-depressant medication, brief focal psychotherapy and supportive behavioural therapy to a point where she was now ready to return to work.

Dr. A, the complainant's new family physician, wrote to the Workers' Compensation Board on September 13, 1982:

The change in her level of functioning subsequent to the incident at work was clearly a sign of a major change in her health. There are no other factors in her environment which could have caused such an illness.

I would submit therefore that the patient's claim for compensation benefits for illness arising out of and in the course of her employment is in order.

The Appeal Board directed that the complainant's case be reviewed by the Psychiatric Consultant, Dr. J, who interviewed the complainant on November 29, 1982 and concluded his report by writing:

It also must be stated unconditionally that this lady did not suffer an accident, but merely witnessed one. It is impossible for me to consider that this accident as such was so psycho-traumatic that she was unable to return to the work force for almost 3 years. To account for her disability, one has to consider deep-seated personality-related elements and possibly considerations of secondary gains. I could not recommend acceptance of psychiatric entitlement in this case.

In response to Dr. J's report, Dr. B wrote on April 5, 1983:

I believe that if the incident had not taken place, the complainant would not have suffered the disabling psychiatric effects that followed it, that it was not a response to a natural life event, and that the incident took place in the work place.

On May 27, 1983 the Appeal Board found that the reports of Dr. B and Dr. A did not contain evidence which would cause the Board to vary, amend or revoke the decision of February 2, 1981 nor to grant a new hearing.

During the course of my investigation, I formed the tentative view that I might conclude, pursuant to section 22(1)(b) of the Ombudsman Act that:

- (1) the Appeal Board in its decision dated February 2, 1981 was unreasonable not to find that the complainant was involved in an accident resulting in personal injury in the course of her employment; and

- (2) the Appeal Board in its decision dated May 27, 1983 was unreasonable to find that the reports of Dr. A and Dr. B did not contain evidence which would cause it to vary, amend or revoke its previous decision of February 2, 1981, nor to grant a new hearing.

In a letter dated April 19, 1984 I advised the accident employer and the Chairman of these possible conclusions and my consequent possible recommendation. In support of the first possible conclusion, I pointed out:

The complainant was involved in an accident at work on January 29, 1980. She was in the immediate vicinity of a falling light fixture, was showered with debris, was apparently knocked to the floor, and required assistance in order to move to the First Aid area. The complainant immediately exhibited signs of personal injury in the form of a psychologically disabling condition. Prior to the accident she was not disabled but, subsequent to it, every physician she attended noted psychological problems.

In support of the second possible conclusion I pointed out:

Dr. A, a family physician, and Dr. B, a psychiatrist, were the only attending physicians who addressed in depth the issue of the complainant's psychological disability and its etiology. They were both of the opinion that she was disabled and that her disability could be attributed directly to the work accident of January 29, 1980. Dr. J of the Board disagreed that the complainant's disability could be attributed to the work accident. Considering the complete variance of opinion between the attending physicians and the Board's psychiatrist, the Board should have taken it upon itself to reconsider the reports of Dr. A and Dr. B.

My letter of April 19, 1984 went on to state my possible recommendation:

The Appeal Board should revoke its decisions of February 2, 1981 and May 27, 1983 and grant entitlement to the complainant for personal injury by accident arising out of and in the course of her employment. [Reference: the Ombudsman Act, section 22(3)(g)]

The accident employer responded to my letter of April 19, 1983 on July 5, October 1, and December 21, 1984. He supported the Appeal Board's decision, noting that the complainant had been absent from work for long periods in 1978 and 1979, that she had emotional problems in the

past, that her family physician did not recommend time off from work, and that the complainant was not physically injured.

The Chairman's August 3, 1984 response to my letter of April 19, 1984 stated that since the complainant did not sustain a physical injury, her claim could only have been accepted if the accident had some psychopathogenic quality, that is, if it had been particularly horrifying, resulting in severe injury or death to others. I note that both the complainant and a co-worker described the events of January 29, 1980 as disturbing. Her attending psychiatrist was of the opinion that the accident was sufficiently traumatic to have precipitated her emotional disability.

The Chairman's August 3, 1984 letter went on to refer to a "crucial inaccuracy" made by Dr. B in stating that a lightbulb had exploded and injured the complainant and a co-worker, rendering his conclusions unacceptable to the Appeal Board. I note that Board policy defines "injury" to include both physical and emotional disability and Dr. B, a psychiatrist, is qualified to judge emotional disability. The complainant's co-worker received contusions and lacerations. Since in my view both women were injured, Dr. B's comment does not appear to constitute a crucial inaccuracy.

The Chairman's letter of August 3, 1984 stated that Dr. C's evidence regarding the complainant was preferred to that of Dr. A and Dr. B because of her past close association and her involvement at the time of the accident, and because Dr. A's advocacy tended to make his evidence less objective. I note that Dr. C was recorded by a Board investigator in June 1980 as having seen the complainant on January 29, 1980 and noting that she was very depressed, as telling her there was nothing wrong with her in February 1980, as telling her that she (Dr. C) was fed up in May 1980, and that everything was perfect in June 1980. Meanwhile, other physicians examining the complainant close to the time of the accident noted psychological difficulties: Dr. D in April 1980, Dr. E in August 1980, and Dr. F in September 1980. It would appear that Dr. C's view of the complainant and her problems was not more objective than that of Dr. A and ought not to be preferred. Her opinion, that of a general practitioner, should not be preferred over that of Dr. B, a psychiatrist.

In summation, the Chairman's August 3, 1984 letter stated:

... the Appeal Board cannot agree that its decision was unreasonable, and consequently will take no steps to implement your tentative recommendation.

This Office asked Dr. B on August 27, 1984 to clarify his use of the term "injury" in referring to the complainant's experience in January 1980.

Dr. B replied on September 25, 1984 that the complainant had suffered a psychological rather than a physical injury. Furthermore, comparison of the history as related by the complainant with other reports and with interviews of other family members led Dr. B to believe she was a reliable historian. He went on to say:

The Workmen's Compensation Board appears to have based their case on the assumption that, as the incident that the complainant witnessed was a relatively minor one, it should not have been responsible for creating a psychiatric disability. While it is very difficult to assess the meaning of psychosocial stressor to any particular individual, different people are susceptible to different stresses.

The most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM3) has recognized for the first time the post-traumatic stress disorder which can be either chronic or delayed. It describes the essential feature as being the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience. In my estimation, I believe that the episode with the light bulb was an unusual and extremely distressing experience for the complainant.

Dr. B reiterated his opinion that the incident was directly responsible for the complainant's psychological disability:

... If the incident had not occurred the complainant would not have experienced any psychiatric problems at the time that she did, nor was she likely to develop longstanding psychiatric symptoms that would incapacitate her to the point where she was unable to work. These are directly due to the reaction to the traumatic event.

Dr. B's letter of September 25, 1984 was sent to the Board as new evidence on October 10, 1984.

The Appeal Board requested that Dr. J, the Board's Consultant Psychiatrist, review Dr. B's letter and give his opinion. Dr. J wrote on December 4, 1984 that he considered Dr. B to be a very determined advocate for the complainant and critical of Dr. C for not providing adequate treatment. Dr. J drew attention to Dr. B's statement that the complainant had been injured when the lightbulb exploded and labelled it a "misstatement of fact," reflecting misinformation provided by the complainant. Dr. J continued to contend that the complainant was an unreliable informant. He was of the opinion that it was absurd to consider that the accident she witnessed was so psychotraumatic as to preclude her return to work for more than three years. Dr. J concluded:

... at the time of my interview, the claimant displayed not the slightest evidence of psychiatric symptomatology which could conceivably warrant an award.

On December 31, 1984 the Board responded to our new evidence letter of October 10, 1984:

Having reviewed Dr. B's report as well as the report from Dr. J, the Appeal Board could not conclude that its decisions of February 2, 1981 and May 27, 1983, ought to be changed.

Before reaching a final conclusion in this case, I have again carefully considered all of the factors involved, as outlined in my letter of April 19, 1984, and reflected upon the Board's August 3, 1984 response to that letter. I am of the view that the Chairman's response does not constitute a significant refutation of the information outlined in my letter of April 19, 1984 in support of my possible conclusions and subsequent possible recommendations. I note that the complainant was involved in an accident at work, immediately exhibited signs of personal injury in the form of an emotional disability, continued to exhibit an emotional disturbance as observed by attending specialists, and was diagnosed by her attending psychiatrist as having an Adjustment Disorder with Mixed Emotional Features.

I have also carefully reviewed the Board's December 31, 1984 response to our letter bringing to its attention Dr. B's report of September 25, 1984. I note that the opinions of Dr. J, a psychiatrist for the Board, and Dr. B, the treating psychiatrist, are in diametric opposition as to the complainant's psychological condition and its cause. I note also that Dr. F neither diagnosed the complainant's condition nor described its etiology. As well, I note that the Board's policy on Benefit of Doubt states:

When applied to an injured worker, the effect is that the worker does not require a preponderance of evidence in support of his claim. Rather, if there is doubt on any issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the injured worker.

In the complainant's case the evidence for and against her claim comes from two fellows in psychiatry. There is no reason, as far as I am aware, to place more weight on one opinion than on the other. Consequently, the policy on the benefit of doubt applies.

Accordingly, it is my opinion that the Appeal Board's decisions of February 2, 1981 and May 27, 1983 were unreasonable in that they failed to extend to the worker the benefit of doubt when considering the medical evidence.

It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board should revoke its decisions of February 2, 1981 and May 27, 1983, and grant entitlement to the complainant for personal injury by accident arising out of and in the course of her employment.

This recommendation was included in a report to the Chairman dated March 11, 1985.

The Board had not responded to the report and recommendation by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 16

The complainant's original complaint against the decisions of the Appeal Board of the Workers' Compensation Board dated October 13, 1981 and December 7, 1981, was brought to the attention of this Office during an interview at the Thunder Bay Regional Office on February 12, 1982.

On April 27, 1982, the Workers' Compensation Board was notified of our intention to investigate the complaints, which were summarized as follows:

The complainant contends that it was unreasonable of the Appeal Board, in a decision dated October 13, 1981 to deny him entitlement for cervical disability as related to his industrial accidents of September 14, 1951; October 29, 1957; April 22, 1965; September 20, 1966; November 6, 1974 and January 13, 1977.

The complainant agrees that, as the Appeal Board noted, it may not have been specifically established that he sustained injury to his cervical spine in any of his accidents. However, he points out that he has a medical history of cervical problems dating back to Dr. B's report of September 18, 1970, through Dr. C's letter of January 7, 1972 to Dr. J' letter of May 3, 1974 and continuing. Further, the complainant contends that the Board should consider the number of accidents he has experienced relating to his back or shoulders and the probability that those could have affected the cervical area as well. The complainant feels that his work record and his attempts to continue working attest to the integrity of his statements and his credibility as a witness should be noted.

Moreover, given that he is currently assessed by the Board as 60% disabled as a result of his back problems, the complainant points out that it was only natural that throughout the years, he gave priority to this back in the reporting of his injuries as it was and is more severely injured than his neck.

Taking all these factors into account, the complainant contends that it would be reasonable of the Board to grant him entitlement for cervical disability.

In its letter dated May 5, 1982, the Board declined to comment. The file was subsequently assigned to a member of my investigative staff for investigation. During her investigation, the investigator was informed by the complainant that there was another issue under dispute, relating to the apportionment of the complainant's pension. Subsequent to an Appeal Board decision dated March 28, 1983, another letter was sent to the Board on April 26, 1983, notifying the Chairman of our intention to investigate this aspect of the complaint as well, which was summarized in the following manner:

That the Appeal Board decision dated March 28, 1983 was unreasonable to deny his appeal to have his pension of 60%, currently fully payable under [the 1951] claim, divided among his three major claims.

The complainant states that it was factually incorrect of the Board to have noted and accepted that his accident of October 29, 1957 appeared to have been a minor aggravation which required medical aid attention only. He refers to the October 16, 1982 letters of the treating physician for that accident, Dr. A, who wrote both that the 1957 injury "required hospitalization" and that it was a "major accident". As only Dr. A treated the complainant for this accident, the complainant does not understand why the only first-hand medical observations were not accepted by the Appeal Board.

Further, the complainant points out that Dr. D, who treated him at the Clinic after Dr. A left, also confirms that the 1957 and 1974 accidents resulted in "definite acute injuries". The complainant accepts that he worked after his second and third accidents; however, he notes that he worked after his first accident as well. After both the first and second accidents, he returned to modified employment for several months.

The complainant contends that on the basis of medical evidence and taking into account his employment history, the Board should reconsider its decision.

In a letter dated May 16, 1983, the Assistant Secretary responded on behalf of the Chairman. He pointed out that the accident of October 1957 had not required lost time from work and that a review of Dr. A's report failed to reveal any indication that the 1957 injury required hospitalization.

During the course of this complex and involved file, several letters containing new evidence were sent to the Board at various times, but, in each case, the Board declined to change its opinion. Thus it should be borne in mind that any recent medical reports referred to during the course of this report have been seen and noted by the Board. Also, for the sake of clarity, it should be noted that I will discuss the apportionment of pension and cervical entitlement separately within the body of this report.

Our investigation has revealed that during the course of his employment, the complainant suffered three significant injuries to his back, right leg, and shoulder area. The first of these occurred on September 14, 1951 when the complainant was 23 years of age. While loading tires at a railway platform, he lost his balance, which resulted in several tires falling on him, causing pain to his lower back and right leg. He originally tried to return to work on October 15, 1951, but suffered increasing pain and was forced to lay off by the afternoon. He was hospitalized from October 16 to 24 with a ruptured intervertebral disc, L5-S1. Treatment was conservative and the complainant returned to work on light duties as of November 5, 1951; after a few months, he returned to his regular duties.

Although the complainant occasionally suffered from back pain, as noted in the letter of November 24, 1956 from his family physician, Dr. A, he was able to keep working steadily throughout the next five years. However, in the fall of 1956 his disc problems worsened and, in December of that same year, orthopaedist Dr. F performed a laminectomy and discotomy on the right at L5-S1 for herniated disc. The complainant was off work until March 18, 1957, when he resumed his regular duties. He continued to have some problems with his right foot but was otherwise able to work steadily.

On October 29, 1957, the complainant's second occupational accident occurred. While rolling a ten-foot-high tire, he lost his balance and had to support the 1500-pound weight of the tire above his head for approximately half a minute. Although the employer's report indicated that there was no layoff and no medical aid, it also stated that he did go to the hospital for x-rays. The Board has always been of the position that this accident was minor, with no medical aid required. However, medical documentation has established that Dr. A saw the complainant the following day, diagnosing lumbosacral strain and possible exacerbation of disc; he also estimated a two-week disability. Further

evidence on file has revealed that the complainant was hospitalized at least for the weekend and certainly went on light work at the tire shop until May of 1958.

The complainant saw his surgeon, Dr. F, on November 29, 1957 because of pain in his back. Dr. F was of the opinion that he was suffering from the after-effects of recurrent strain coming on his lumbosacral disc. The surgeon was hopeful that the pain might clear up, as was the case prior to the second injury.

Because the pain in his back and leg continued, the complainant underwent a pension assessment in August of 1959 and received a 10% permanent disability award. He continued to work full-time (transferring to another company in 1959) until the spring of 1973, when he was off work for four months as the result of a non-compensable myocardial infarction. By this time his back and leg disability pension had been increased to 25%.

In August of 1973, the complainant saw orthopaedist Dr. E because of increasing back pain and progressive weakness of the right leg. He was off work between October 29 and November 25, 1973, during which time he was admitted to hospital where Dr. E performed a steroid injection of the S1 root. Surgery was not contemplated at that time because of the recent heart problems.

The complainant returned to work at the end of 1973 and performed his normal duties until November 6, 1974. At this time he slipped on a pipe and fell, striking his back heavily. Dr. D, his family physician, diagnosed acute lumbar strain and possible aggravation of previous disc. No time was lost and the complainant continued to work. However, his back began bothering him more and Dr. E felt that his last accident had stirred up his old back problems and, consequently, on May 19, 1975, the surgeon performed: 1) right L4/5, L5/S1 laminectomy and exploration of L5 and S1 root; 2) neurolysis and rhizotomy right S1 root; 3) foraminotomy and excision of right pedicle, L4; 4) interdiscal injection of chymopapain L4/5; 5) three-segment intertransverse fusion L3 to sacrum.

The complainant returned to work on October 4, 1976 but took an early retirement effective August 30, 1979, as he no longer felt capable of continuing heavy manual work. At the time of his retirement, he was in receipt of a 60% pension. A 10% award, retroactive to May 19, 1975, was granted in June of 1983, giving the complainant a pension of 70%.

During the course of the investigation, it was noted that the complainant's file had been opened under his 1951 accident and that all subsequent awards were processed under that claim. Whenever he saw a new doctor or orthopaedic surgeon, he was automatically listed under that

claim. There is unanimous agreement amongst Board physicians who have assessed the complainant that he is severely disabled. The question of the contributory effects of the 1957 and 1974 accidents to the complainant's severe disability was not raised as an issue until 1978. On July 26, 1978, Dr. E wrote that the complainant had been involved in a further accident in November of 1974 which stirred up all the problems in his back with the development of increasing pain and sciatic distribution; it was because of this he was admitted to hospital.

In an effort to clarify the nature and extent of the latter accidents' importance in the complainant's disability history, his treating physicians, Drs. A and D, were written for their respective opinions. Dr. A, who treated the complainant from 1951 to the early 1960s, responded as following in a letter dated October 16, 1982:

I saw the complainant on October 30, 1957 following an injury to his low back on October 29. This required hospitalization on October 30, 1957.

Although I wrote possible exacerbated [sic] of disc disorder on the initial report, subsequent examinations confirmed that he had sustained a major injury as confirmed by my notes of November 25, 1957 and November 30, 1957. He was in fact, not allowed back on normal heavy work in the tire shop until May 1958.

I saw the complainant on November 25, November 30, 1957, April 3, 1958, April 23, 1958, June 4, 1958, July 9, 1958, July 24, 1958, October 21, 1958, October 28, 1958, December 1, 1958, February 23, 1959, February 24, 1959, July 31, 1959, September 28, 1959, January 21, 1960. A total of 15 visits.

Over this entire period there were symptoms and objective signs of severe and progressively disabling back disease. During much of this time the workman continued to be self-supporting, despite continued pain on a job involving heavy labour.

It is my considered opinion that the injury of October 29, 1957 was a major episode leading to this workman's eventual inability to carry on in July 1979.

Dr. D, the complainant's family physician from the 1960s to the present, wrote to the Board in November of 1982, stating:

This is to confirm that the injury sustained by the complainant in October 1957 and November 1974, were definite acute injuries and exacerbated the 1951 injury.

The Appeal Board decision of March 28, 1983, denied the complainant's request to apportion his pension amongst his three claims for the following reasons:

- 1) The original accident occurring on September 14, 1951, led to a major disability, requiring surgery in 1956;
- 2) The accidents occurring on October 29, 1957 and November 6, 1974 appear to have been minor aggravations of the already existing back problems and required medical aid attention only;
- 3) The complainant was able to carry on with his work subsequent to the second and third accidents;
- 4) The preponderance of evidence on file did not support that the second and third accidents contributed significantly to the complainant's overall disability.

On February 17, 1984, the Temporary Ombudsman advised the Chairman of a possible conclusion and recommendation pursuant to section 19(3) of the Ombudsman Act. He tentatively concluded that the Appeal Board, in its decision dated March 28, 1983, was unreasonable to deny the complainant's request for apportionment of his pension amongst his three major claims. In support of this conclusion, the Temporary Ombudsman noted the medical opinions from Drs. E, D and A which supported the importance of the 1957 and 1974 accidents in regard to the complainant's progressively worsening disability. The Temporary Ombudsman also found that the Board had no medical opinions from its own physicians to support its position that the second and third accidents were minor in nature. The Temporary Ombudsman also commented that of the factors cited in the Board decision to support its position, only the first one can be accepted. It was pointed out that hospitalization was required for the 1957 accident (point number 2); that the complainant went on light duty following the first and second accidents (point number 3) for an equal amount of time, and that any of the medical evidence that specifically addressed the importance of the second and third accidents in relation to the complainant's overall disability did indicate their significance (point number 4). The Temporary Ombudsman also stated that although Drs. A and D were not specialists, it was the case that they were the treating physicians at the time of the 1957 and 1974 accidents respectively. Therefore, they would have been in a special position to evaluate the immediate and long-term effects of these accidents on the complainant's overall disability and, accordingly, it would appear that their opinions should be given some weight.

The Temporary Ombudsman tentatively recommended that the Appeal Board revoke its decision of March 28, 1983 and apportion the complainant's pension in an appropriate manner amongst the three major claims.

The Chairman responded in a letter dated April 30, 1984. In his response, the Chairman stressed the seriousness of the first accident in 1951 which necessitated surgery in 1956 for a herniated intervertebral disc. The Chairman also stated that the Temporary Ombudsman's earlier letter conceded that the worker was not required to lose any time from work. The Chairman also pointed to a medical report from Dr. F which he felt undercut any significance of the 1957 accident. The Chairman also called into question Dr. A's report of progressively disabling back disease and noted two further reports from Dr. F which did not mention any effect of the 1957 accident.

With regard to the importance of the 1974 accident, the Chairman pointed out that Dr. E had contemplated surgery prior to the time of the accident. In conclusion, the Chairman could not agree that the Appeal Board's original decision not to grant apportionment amongst the three claims had been unreasonable.

In an attempt to clarify certain of the medical issues raised by the Board in its response, Dr. D was contacted and asked to refer to his records. He sent a lengthy letter to my Office on June 18, 1984, a copy of which was forwarded to the Board for its consideration.

Dr. D provided several specific analyses and reasons for the importance of the 1957 and 1974 accidents. However, the Board did not feel there were sufficient grounds on which to reverse its decision.

I have considered and carefully reviewed all the voluminous medical opinions as well as the representations of the Board. It seems to me, in part, that the lengthy response of the Chairman to this Office's original letter has not dealt directly with the issue raised. In any file the size of the complainant's, various comments can probably be taken to bolster any given point and certain phrases used to forward one's own view. I would stress that it is inappropriate to look at the complainant's case in an adversarial light; rather, all concerned should be endeavouring to see whether the majority of medical evidence addressing the issue supports or disproves the claim. Again, I must reiterate that the reports of Dr. A, Dr. D and Dr. E weigh heavily in my consideration. The Board questions Dr. A's conclusion that the 1957 accident was major; however, it must be borne in mind that Dr. A treated the complainant for over a decade, referred to his own extensive notes, and arrived at his medical conclusion. I do not feel qualified to second-guess the doctor and I accept his conclusions as stated. The same applies to Dr. D. It is quite clear from the material the doctors supplied that they have gone through all of their records in depth and have reached their considered medical opinions.

Again, one must consider whether a treating orthopaedic surgeon, such as Dr. F, would think to apportion the complainant's injury

between the two accidents when he was not asked to do so. Rather, he was primarily interested in the 1956 surgery which he performed and, as a result, the complainant's recovery from that surgery. At that time, the question of entitlement for the 1957 injury was not an issue and could hardly have been raised. Moreover, Dr. F did acknowledge that the complainant's recovery from his 1956 surgery had been progressing satisfactorily until the new incident (of 1957).

It is not my intention to suggest how the Board should apportion the pension; I believe that that is a matter best left to its own discretion. Nevertheless, after carefully considering all of the evidence, I have concluded, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of March 28, 1983 was unreasonable and, accordingly, it is my recommendation, pursuant to section 22(3)(g) of the Act, that the Appeal Board should revoke its decision and apportion the complainant's pension among his three major claims.

I would like to turn now to the question of cervical entitlement. As well as the three major incidents described in the first part of the report, the complainant suffered three other injuries involving his upper torso. A number involved wrenching or twisting to the back and shoulders. Not only did the complainant have numerous accidents during his employment history, he also underwent major surgery in 1957 and 1974. In 1973, he suffered a myocardial infarction and was off work for some four months. As well as a continuous history of back pain, the complainant has had documented and accepted hip, right leg and foot disabilities resulting from nerve root irritation in his back. The complainant's right leg is considerably atrophied and there is marked claw deformity of his right foot.

I mention all of these injuries by way of a background for the complainant's history of cervical pain. After his accident in 1957, which involved holding a 1500 pound tire above his head for several seconds, the complainant began to complain of neck pain and dizziness. There are, as provided by Dr. D in his June 1984 letter to my Office, medical reports of 11 specific instances of complaints of the neck and shoulder region in the 1960s. From 1970 onwards, there is consistent mention of neck pain in the medical reports.

Cervical x-rays taken in March of 1970 showed osteophytes at C5 and C6 with a narrowing of disc spaces between C5-6. Various specialists commented on neck pains in their reports from the 1970s. Dizzy spells and neck pain continued and in 1978, the complainant formally requested entitlement for his cervical disability from the Board.

A memo dated November 16, 1978 from a Pensions Adjudicator, noted that the complainant was concerned that a ruling be made on entitlement for neck disability which was related to the 1957 accident. In

her disposition, the Pensions Adjudicator observed that the file would have to be referred to Claims and commented as follows:

It is quite obvious that the man has had ongoing neck problems for a number of years but it is questionable as to whether or not these should be considered compensable in view of the fact that in 1970 the diagnosis was cervical disc disease.

Dr. G, Surgical Consultant for the Board, reviewed the claim file and in a memo dated January 15, 1979, stated:

I do not think that there are reasonable grounds on which we could extend his entitlement under this claim [1951 accident] to include his neck region.

During the complainant's admission to the Back Assessment Rehabilitation Centre in January of 1979, Dr. H opined that the cervical spondylosis was probably an independent condition unrelated to the injuries described.

In a memo from February 26, 1979, Board personnel relayed the following information from an interview with the complainant. Apart from some cervical pain following his 1956 surgery, the complainant did not experience any consistent problems with his neck until following his accident of 1957. Following this memo, Dr. G looked at the records again but maintained his previous opinion, although no reasons were given. In its decision dated October 13, 1981, the Appeal Board noted that:

- 1) it had not been established that the complainant had sustained injury to his cervical spine in any of his accidents;
- 2) The opinion of the Board's Surgical Consultant was that the cervical disability was not related to the accidents.

Consequently, the complainant's appeal was denied, as was his wife's letter to the Board requesting reconsideration in a decision dated December 7, 1981.

Following the Appeal Board decision, further evidence was obtained from Drs. A and D. In Dr. A's letter, he stated that the complainant's 1957 accident was an important factor in the subsequent development of cervical spine degenerative disc disease. Dr. D reviewed the file and stated that very definitely the complainant's neck problems were related to his injury of October 1957 and exacerbated by subsequent injuries of 1965, 1969 and 1977.

Although these letters were sent to the Board as new evidence, the Assistant Secretary, on behalf of the Appeal Board, notified my Office that they were not sufficient to cause the Appeal Board to change its views.

A letter was sent from this Office on February 17, 1984 with the possible conclusion that the Appeal Board was unreasonable to deny the complainant's request for entitlement to his cervical disability and the possible recommendation that the Appeal Board should revoke its decisions and grant him entitlement. That letter noted the series of accidents to the complainant's upper torso, the letters of Drs. D and A relating it to the work accidents, the complainant's own testimony that the cervical pain came on following the 1957 accident, and the fact that the new evidence had never been forwarded to the Medical Branch for an updated report.

In the Chairman's response of April 30, 1984, he agreed there was intermittent cervical discomfort between 1957 and 1960, but noted that the first documented complaint did not occur until five months after the accident in 1957. The Chairman commented that there was a 10-year period between 1960 and 1970 when there was no documented evidence of any neck problems, in conjunction with the fact that, when the complaints recurred in 1970, the diagnosis was degenerative disc disease.

The Chairman also noted that Dr. G had been consulted for his opinion on the more recent reports from Drs. A and D. He quoted at length from Dr. G's memorandum, which concluded with his firm medical opinion that there was no evidence to relate the complainant's cervical problems of a degenerative nature to his accidents. Dr. G also concluded that the letters from Drs. A and D represented benevolent advocacy and did not offer a vestige of a reason for the opinions they stated.

I have carefully considered all of the evidence relating to this issue and am still convinced that the complainant's cervical disability can reasonably be attributed to his employment history. As Dr. D's most recent letter points out, there were several documented occasions of complaints for neck pain in the 1960s. Given the complainant's history of working whenever possible despite his exacerbating disabilities, it is not surprising that there are not that many complaints on record.

Dr. G, in his memo, felt that Drs. D and A were not giving medical opinions per se. A careful perusal of Dr. D's and A's letters does not support this, as they have proceeded on the medical evidence to give their interpretations. I am again guided by the fact that Drs. A and D have seen the complainant on an ongoing and continuous basis. They have all of his records at their disposal, and are in the best position to judge whether or not it is likely that his neck problems have resulted

from his documented twisting injuries to the back and shoulders. I agree that one cannot state with certainty that any particular accident or accidents have caused or aggravated the complainant's cervical disc degeneration. However, the probability of this causal relationship is sufficiently compelling for me to support the case. Therefore, I conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decisions were unreasonable to deny the complainant entitlement for his cervical disability, and I recommend, pursuant to section 22(3)(g), that the aforementioned decisions be revoked and that the complainant be granted entitlement in accordance with the Board's assessment of his actual cervical disability.

This recommendation was included in a report to the Chairman dated February 15, 1985.

The Board had not responded to the report and recommendations by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 17

The complainant approached this Office on August 11, 1982, with a complaint against a decision rendered by the Appeal Board of the Workers' Compensation Board dated July 23, 1982. The complainant contended that the Appeal Board was unreasonable to have denied his request for psychiatric entitlement. The Appeal Board had concluded that the complainant's psychiatric disability "diagnosed as psychoneurotic reactive depression, [was] not causally related to the industrial accident."

On September 8, 1982, the Chairman of the Workers' Compensation Board was notified, in accordance with the requirements of the Ombudsman Act, of our intention to investigate the complaint. The Chairman was invited to make a statement of the Board's position with respect to the complainant's contention.

On September 14, 1982, the Assistant Secretary responded on the Chairman's behalf by stating that the Board did not wish to make a statement at that time.

This complaint was assigned to a member of my investigative staff, who thoroughly reviewed the complainant's Workers' Compensation Board claim file and considered the relevant legislation and Board policy and practice relating to the issue.

The investigation revealed that on October 9, 1969, the complainant, then 41 years old and employed as a labourer, injured his back while moving a cement block. The initial diagnosis was a lumbo-sacral strain. The Board granted the complainant entitlement for his lumbo-sacral strain and paid him temporary total disability benefits from October 10, 1969 to December 29, 1969. Subsequently, due to exacerbations of back pain, the complainant laid off work. He received conservative medical treatment and compensation benefits on numerous occasions.

On January 19, 1979, the complainant laid off work and complained of back pain which radiated into his legs. His family physician, Dr. E, diagnosed an acute L5-S1 protruded disc. This diagnosis was not substantiated by subsequent medical investigations. On February 6, 1979, an orthopaedic specialist, Dr. D, related the complainant's back pain to lumbar degenerative disc disease. The complainant received temporary total disability benefits from January 22, 1979 to April 28, 1980. Following a pension reassessment on April 2, 1980, the complainant's organic pension award was increased from 10% to 20%.

The medical documentation subsequent to January 1979 revealed that the complainant was examined by several specialists. On March 2, 1979, Dr. D reexamined the complainant and noted that he was complaining of bilateral leg pain and "... back pain with almost anything" Dr. D also reported that:

... [the complainant] is obviously quite depressed today because when I suggested some rest in hospital would be indicated, but that he was not going to be a candidate for surgery, he was obviously upset. I spent a good deal of time talking with his daughter explaining to her what is going on with the complainant and I think she appreciates the psychological component of his illness is significant.... This man is not a candidate for surgery.... We'll simply have to manage him conservatively....

No specific diagnosis was provided in this report. However, this was the first indication by a physician of any psychiatric component.

The complainant was admitted to the Board's hospital on August 27, 1979 and discharged on September 28, 1979. Dr. C, the admitting physician, noted upon examination that the complainant displayed "... some over-reacting and there were many inappropriate responses." No psychiatric diagnosis was provided. Two days later, Mr. S, PhD. (a psychometrist) conducted a personal appraisal and reported that:

Subjective findings:

The patient complained about considerable back pain. During the last 10 years, he always had his ups and downs. His sleep is poor because of pain. His appetite is diminished because of medication.... His pain sometimes becomes so severe that he starts crying.... He has no debts, but as their financial situation is deteriorating he is afraid that he will have to sell his house.

Objective findings:

The complainant is a depressed looking man in his fifties.... He was cooperative, but on one occasion he started crying.... Projective test showed depression, defensiveness anxiety, feelings of inferiority and an excessive sense of self-criticism. He is a schizoid type of person and there is some moderate over-reaction to his injury.

Assessment and Plan:

This man is chronically ill and there is very little hope that he might respond to treatment. On emotional grounds he might be completely disabled. Increase of his disability pension might be considered.

The first psychiatrist to examine the complainant, Dr. O, did so on September 5, 1979. Dr. O's report reads in part:

... He appeared mildly depressed. There was no evidence of delusions and hallucinations nor of malingering.

The complainant told me that his condition is worsening every year. He complained of constant pain.... He feels nervous and depressed.

Concerning his future, he feels quite pessimistic due to his condition.

This patient has developed a psychoneurotic reaction with an element of reactive depression triggered off by his back injury of 1969 and repeated exacerbations. He gave the impression of having reached the point where he would give up. Nevertheless, it may be worthwhile putting him on an antidepressant on a trial basis ... in combination with a Back Education Program and Counselling.

Dr. L, an Orthopaedic Consultant for the Board, examined the complainant on September 28, 1979 and noted that "... clinical testing was encumbered by [the complainant's] reluctance to perform." Dr. L also noted that x-rays revealed some minimal degenerative disc changes in all the levels of the complainant's spine, which Dr. L felt were compatible with the complainant's age. Dr. L's concluding remarks were as follows:

I think that this patient's physical findings are at variance with the minimal x-ray evidence. Further, he manifests obvious functional overlay as noted by his reluctance to perform, over-reaction, and facial grimacing.

At the same time, this examiner had the impression that the patient was depressed.

... because of his age, and language barrier, it is not likely that he could be retrained to perform a job commensurate with his symptoms. In fact, I think the situation is rather dismal for this patient, in terms of his future work potential. Rather, I think he should be considered by the Pensions Department for permanent disability, and reassessment ... I do not foresee the need for, nor the benefit derived by further investigation....

On September 28, 1979, Dr. B prepared the hospital Discharge Report. He noted that it was unlikely that the complainant could be retrained because of his physical and psychological disabilities. Dr. B also noted that the complainant had been given a three week supply of antidepressants. No specific psychiatric diagnosis was recorded.

In a memorandum dated October 11, 1979, the Claims Adjudicator responsible for the complainant's file recommended that the Board grant the complainant a 10% provisional psychiatric award for two years based on "... the serious nature of [the complainant's] back disability and his repeated recurrences and Dr. O's findings...." The Claims Adjudicator's supervisor concurred with this recommendation. However, Dr. J, a Board Surgical Consultant, reviewed the complainant's file on October 19, 1979 and reported:

Noting work record over the years I would not be inclined to feel that any present psy problem is related to acc in 69.
[sic]

A Board Psychiatric Consultant, Dr. F, obtained the complainant's file and requested that a Board Social Worker interview the complainant. That interview was conducted by Ms. T on November 28, 1979.

The complainant advised Ms. T that he was depressed because he was too young to be a pensioner and he was concerned about his economic future. He also complained of back pain which radiated down both his legs. The complainant described to Ms. T his work history and expressed his concerns about the lack of future prospects which he perceived for himself. He also added that he spent his days at home reading or watching television and that he often thought about his own country and how "unfortunate his life has been in Canada". Ms. T recorded that the complainant expressed anger about his Board claim and believed that he had been "pushed" to return to work in 1969. According to Ms. T, the complainant was "quite offended that he was referred for psychiatric consultation during his admission to H & RC and seems to have perceived that as an insult".

With respect to his financial situation, the complainant stated that his family did not have any outstanding debts but Ms. T reached the conclusion that his "... preoccupation with financial matters seems related to a general feeling of discouragement and hopelessness about his future." In her concluding remarks, Ms. T noted:

The complainant ... looks sad and discouraged. At times, he was slightly irritable and tearful.... Certainly, at this time, I think the complainant quite sincerely considers himself totally disabled.

On December 14, 1979, the complainant's file was reviewed by the Committee for Assessment of Major Psychotraumatic Disabilities, consisting of Dr. F, Mr. Q, the Supervisor of the Board's Pensions Department, and Mr. P, a Supervisor from the Claims Department. The complainant's entire file was available to the conference members who noted, in particular, that although the hospital discharge report referred to the psychiatric aspect of the complainant's claim, no psychiatric problem was recorded in the discharge report per se. The conference members also noted Dr. O and Mr. S's remarks along with the social worker's report. The results of the conference were recorded by Dr. F in a memorandum which reads in part:

It should be emphasized that this man has not demonstrated any secondary psychogenic problem throughout the 10 years after the accident until 1979 when he was examined by Dr. O who suggested 10 years after the accident that the claimant has developed a psychoneurotic reaction with an element of reactive depression triggered by the injury in 1969.

It was agreed by the members of the conference that the above suggestion is indeed speculative and presumptuous and in a sense, contrary to the evidentiary standards in the development of the true post traumatic neurosis. Consequently, we recommend to deny psychiatric entitlement.... Please note also that

this man has worked from time to time, but being a seasonal worker he was laid off frequently from construction work....

The complainant was not granted psychiatric entitlement.

On April 2, 1980, Dr. M, a Board Pensions Medical Officer, examined the complainant and recommended an increase in his organic pension award to 20%. Dr. M concluded his report with the comments:

This very sad, depressed looking man would appear to have given up his enthusiasm for any type of employment.... If he attempts to do something his back hurts and he stops.... It would appear to be a fairly large psychogenic functional overlay and I would think his main problem is this.

In August, 1980, Dr. E referred the complainant to a psychiatrist, Dr. A, who reported that the complainant:

... complained of lower back pain radiating to both legs and sometimes up to the nape of his neck. He also has a variety of symptoms such as impaired sleep because of the stomach pains associated with the intake of analgesics and feeling depressed because of the pains.

... On January 19, 1979, he had an acute attack of lower back pain and he has not been able to work since.... He is aware that they (the Board) considered him "mostly depressed".

Prior to 1969 he had no accidents, illnesses or operations.

... He has one daughter ... and his wife is working.... He represents a bit of financial and personal load on both of them.

It is concluded that this gentleman might have a certain amount of degenerative disc disease of the lower spine.... There is clinical evidence of a certain amount of superimposed dramatization of symptoms compatible with a defence or hysterical mechanism not unusual in a man of his background and circumstances that without English or any skilled occupation has no chances or protection whatsoever to get a job as a common labourer again. He could do a light job but not without a better knowledge of English or some kind of training. The prognosis over the next year or two is poor.

Dr. A recommended Diazepam as a muscle relaxant.

Because the complainant had appealed his 20% pension award, Dr. H, a Senior Board Pensions Medical Advisor, examined him on December 11, 1980. Dr. H recommended that the Board confirm the complainant's 20% pension. Dr. H did comment that the complainant looked depressed at the time of the examination.

In January, 1981, the complainant attended an Appeals Adjudicator hearing because he was dissatisfied with the amount of his organic pension award. Prior to rendering a decision, the Appeals Adjudicator requested that the complainant be examined by a psychiatrist and interviewed by his social worker.

Mr. U, a Board Social Worker, interviewed the complainant on February 17, 1981. In his concluding remarks, Mr. U noted that:

... there has not been a significant change in the complainant's situation in the past year. He continues to feel "totally disabled" by his symptoms and is preoccupied with them. He has no insight into the emotional influences in his condition, although he does present with some depression and is at times harassable. It is evident that he did not begin suffering from emotional problems until having laid off work in 1979, some ten years after his initial accident. He had worked these ten years in apparent discomfort, but not undergoing any serious emotional problems.

Other factors involved in his emotional state are his dependency and the over-protective attitude of his family.

Dr. K, a Board Psychiatric Consultant, examined the complainant on March 12, 1981. In his concluding remarks, Dr. K noted:

It seems clear that the complainant is suffering from a moderately severe depression. The date of onset of this depression is difficult to determine but it seems clear that it is in part reactive to the constant back pain and his inability to find or even consider any type of employment. It appears well established that he suffers from degenerative disc disease of at least moderate severity. I am not sure whether this latter condition is considered by the surgeons to be related to his accident of almost 11 1/2 years ago. However, I do not feel that I can realistically relate his present depression to the accident.

The Committee for Assessment of Major Psychotraumatic Disabilities reconvened on April 23, 1981 prior to returning the complainant's file to the Appeals Adjudicator. The Committee concluded that it would uphold the denial of psychiatric entitlement in the complainant's claim.

In reaching their conclusion, the conference members noted in particular the social worker's February, 1981 report and Dr. K's March, 1981 opinion.

In May 1981, the complainant received an Appeals Adjudicator decision which denied his request for psychiatric entitlement. He appealed further and received an Appeal Board decision in July 1982 which upheld the prior decision.

As part of our preliminary investigation, a letter was written to the Assistant Secretary to the Board, requesting that he refer the complainant's file to Dr. K for his specific comments with respect to the complainant's request for psychiatric entitlement. I have given careful consideration to the Board's written response dated July 20, 1983.

During the course of this investigation, the Temporary Ombudsman, reached a tentative conclusion, pursuant to section 22(1)(b) of the Ombudsman Act that the Appeal Board panel in its decision dated July 23, 1982 "was unreasonable to have denied the complainant's request for psychiatric entitlement".

In a letter dated February 14, 1984, the Temporary Ombudsman advised the Chairman and the accident employer of his possible conclusion and recommendation. The Temporary Ombudsman pointed out that:

- 1) The available documentation revealed that the complainant has experienced several exacerbations of low back pain following his work injury on October 9, 1969. The Board recognized these exacerbations and granted the complainant compensation benefits intermittently over a period of approximately nine years. In addition, subsequent to the complainant's layoff from work in January 1979, his complaints of continuing back pain were again recognized by the Board. The complainant was granted temporary total disability benefits as well as a 10% increase in his organic pension award.
- 2) The first indication that a psychiatric aspect was playing a role in the complainant's disability was noted on March 2, 1979 by Dr. D, who described it as "significant". The first psychiatrist to examine the complainant, Dr. O, expressed the opinion that the complainant had "developed a psychoneurotic reaction with an element of reactive depression triggered off by his back injury of 1969 and repeated exacerbations."

- 3) Neither Dr. J nor Dr. F examined the complainant prior to recommending that the Board deny him psychiatric entitlement. The complainant was examined by Dr. K, who concluded that he could not "realistically relate [the complainant's] present depression to the accident." A review of Dr. K's memorandum revealed that he specifically linked the complainant's depression to his reaction to his constant back pain and "his inability to find or even consider any type of employment." Dr. K also noted that the complainant had degenerative disc disease of "at least moderate severity". However, Dr. K was "not sure" if the complainant's degenerative back condition was related to his accident.

It is my tentative opinion that the medical opinions establish that the complainant's work injury in conjunction with his exacerbations of back pain have produced a cumulative effect precipitating his psychotraumatic reaction and reactive depression.

- 4) It is apparent that prior to responding to our June 1983 letter of inquiry, the Board consulted with Dr. K, who reviewed his initial memorandum of March 12, 1981. Following his review, Dr. K stressed that his 1981 memorandum "also identified the pain as being caused by the complainant's degenerative disc disease." The Board's letter goes on to describe the complainant's degenerative disc disease as "non-compensable" and also describes it as "the source of the majority of pain he experiences." However, according to the Appeal Board decision, the complainant was granted entitlement for an aggravation of his degenerative disc disease. Furthermore, the Board recognized the complainant's constant organic back pain by paying him periods of compensation benefits and a pension award which was increased from 10% to 20% in 1981. Consequently, for the above reasons, and noting Dr. O's opinion, it is inexplicable to me that the Board should describe the majority of the complainant's back pain as non-compensable and also determine that his reactive depression is not related to his accident or its sequelae.
- 5) I am also aware that the Board's psychiatric policy referred to in its July 1983 letter reads, in part:

Where it is evident that a diagnosis of a psychotraumatic disability is attributable to a compensable injury or its sequelae, entitlement

shall be granted providing that the psycho-traumatic disability became manifest within five years of the injury or within five years of the last surgical procedure.

As pointed out in the Board's letter, the above "is considered to be a general rule to be taken into consideration in all cases where entitlement for a psychiatric condition is being claimed." However, it is my tentative opinion that since this is a general rule only, the application of the five-year clause should be waived. The complainant's claim for psychiatric entitlement should be judged on its own merit, having regard for all the available information, which reveals that since the original injury the complainant has experienced back pain resulting in periods of disablement and precipitating a psychiatric disability.

The Temporary Ombudsman tentatively recommended, "pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and grant the complainant entitlement to a psychological disability as being related to his compensable accident and back injury of October 9, 1969".

In a letter dated March 2, 1984, the Temporary Ombudsman received submissions to his 19(3) letter from the Controller, representing the accident employer. The Controller argued that following the complainant's accident and the termination of his benefits in 1971, he worked for lengthy periods, before his layoff from work in 1979. Mr. R maintained that the complainant had non-compensable degenerative disc disease at the time of his accident which, ten years later, resulted in depression and additional discomfort including leg pain. Mr. R reiterated Dr. K's opinion. Mr. R also contended that Dr. A's comments did not relate the complainant's psychiatric problem to his work accident. According to Mr. R, Dr. F and Dr. J's opinions regarding a relationship between the complainant's psychiatric condition and his accident held more weight than the Claims Adjudicator and Supervisor's opinions, because the physicians were experts in their fields.

In a letter dated April 25, 1984, the Appeal Board advised that it could not "agree that its decision was unreasonable" and therefore had decided not "to implement the Temporary Ombudsman's tentative recommendation".

I have considered this case in light of our investigation and the representations of the Board and the accident employer. Since I did not make the tentative recommendation, I felt that it was appropriate to quote the Board's response in detail, followed by my comments.

The Board's 19(3) Response #1

The first factor relied on by the Temporary Ombudsman is a statement of the complainant's recurrent episodes of back disability between his initial recovery in July 1970 and the first mention of non-organic symptoms, in 1979. It is significant, in the Appeal Board's view, that despite recurrences on 6 occasions during the intervening period, all medical reporting for these recurrences is completely devoid of any mention of psychological/psychiatric problems or symptoms.

My Comments #1

Throughout the course of our investigation, we acknowledged that the complainant neither displayed any psychiatric symptoms nor sought psychiatric treatment prior to 1979. This information, however, was not significant in itself to conclude that the Board was reasonable to have denied the complainant psychiatric entitlement.

The Board's 19(3) Response #2

The second factor identifies the first actual indication of the complainant's psychological difficulties, in March of 1979; some ten years after the initial accident and three years after the last exacerbation of low back disability. Reference is also made to Dr. O's report of September 5, 1979.

As Dr. D's report does not comment on the cause or origin of the psychological component, the Appeal Board does not consider this particular report to be relevant to the issue in dispute. On the other hand, Dr. O's report is clearly relevant, and was considered very carefully in the determination of the relationship between the psychological problems and the compensable injury. In this regard the Appeal Board draws your attention to the findings of the Rating Committee for Major Psychological/Psychiatric Disabilities. It was felt by the Committee members that Dr. O's opinion concerning causal relationship was "speculative and presumptuous and in a sense, contrary to the evidentiary standards in the development of the true post traumatic neurosis".

The Appeal Board accepted this assessment of Dr. O's report and therefore chose not to rely on the opinion of Dr. O in coming to its conclusion. In so doing, the Appeal Board accepted that the Committee had greater knowledge of the evidentiary standards used in determining cause/effect relationships in psychiatric disability cases, than did Dr. O. In the absence of

contrary evidence or research by the Ombudsman's office, the panel considers it reasonable to have chosen the Committee's views over those of Dr. O.

My Comments #2

By January 1979, the complainant, aged 51, had already experienced a number of low back exacerbations. It appears that the Board considered that the last exacerbation to the complainant's low back disability occurred in 1976. In my opinion, the complainant's layoff in 1979, which was accepted by the Board as compensable, was due to a further low back exacerbation.

By March 1979, the complainant displayed symptoms which Dr. D interpreted as depression and a significant psychological component. We acknowledged that Dr. D neither presented a specific diagnosis nor commented on the origin of the psychiatric component. However, we concluded that Dr. D's observation was relevant, as it was the first time that one of the complainant's treating physicians reported any psychiatric component, an observation which was made in the third month of the complainant's final layoff from work.

Eight months after the complainant's 1979 layoff, Dr. O expressed the opinion that there was a direct relationship between the complainant's work injury and exacerbations and the development of his psychoneurotic reaction with an element of reactive depression.

In my view, the Appeal Board's sole reliance on the Committee's recommendation is inappropriate. The Committee failed to address the important aspect of sequelae which is a part of the Board's own policy concerning psychiatric entitlement. The policy provides for entitlement when the sequelae of an injury leads to a psychiatric disability. This aspect of the policy was addressed by Dr. O, a qualified psychiatrist retained by the Board. It was not specifically addressed in the Board's response nor by its own Committee.

The Board's 19(3) Response #3

In respect of the third factor, the Appeal Board submits that the fact that neither Dr. J [n]or Dr. F had examined the complainant personally, does not place them at a disadvantage in rendering a medical opinion on the causal relationship between the psychological problem and the accident. Instead, the Appeal Board submits that a medical opinion based on documented evidence, including objective and subjective findings elicited on actual examination by other physicians, is no less valid than a medical opinion from the examiner himself. In other words, the Appeal Board is satisfied that medical

findings as elicited through actual examination and subsequently documented, are no less valid or less useful in developing a medical opinion, than findings elicited firsthand.

As far as Dr. K's assessment is concerned, it must be kept in mind that the doctor participated in the conference on this case and, as a member of the conference, agreed that the psychiatric problem was not attributable to the accident. It would therefore be misleading to quote Dr. K in isolation from all of the evidence.

The Temporary Ombudsman comes to the tentative conclusion that "the complainant's work injury in conjunction with his exacerbations of back pain have produced a cumulative effect precipitating his psychotraumatic reaction and reactive depression".

With due respect for the Temporary Ombudsman, the Appeal Board considers this to be an opinion expressed by a person not trained in psychiatry, on a matter essentially medical in nature. Furthermore, while acknowledging the opposing psychiatric opinions, the Temporary Ombudsman appears to have accepted those favouring a relationship without attempting to construct a scientific basis for doing so. On the other hand, the Rating Committee has considerable experience in the assessment of these types of cases, and the medical members of the Committee are well versed and up to date on the current and relevant scientific data which generally supports the conclusions reached.

My Comments #3

It would appear to me that reviewing documented evidence in conjunction with actual examinations, especially in this case, would have been appropriate because the complainant's 1979 compensable low back disability resulted in a psychiatric problem after years of exacerbations. Although both Dr. F and Dr. J commented on the complainant's work history from 1969, their memoranda do not indicate that they noted, in particular, the number of exacerbations he experienced over the years. Perhaps an examination would have elicited a clearer understanding of the effects of those exacerbations on the complainant's psychological disability.

I am aware that on Thursday, September 13, 1984, the Assistant Secretary advised the Select Committee on the Ombudsman that the Board had changed its practice with respect to reviewing claims for psychiatric entitlement. Currently, Board Psychiatric Consultants do not rely simply on a review of the available documentation. I must assume that this

change in practice occurred because the Board had concerns about relying on psychiatric evaluations conducted on the basis of a claim review only.

In my view, the Temporary Ombudsman did not deal with Dr. K's evidence in isolation. Rather, this evidence was noted as being separate from that of the Rating Committee for Major Psychological/Psychiatric Disabilities. According to the Board's own records, Dr. K did not examine the complainant until 1981, and he did not attend either of the Committee meetings.

The Appeal Board also related that the Temporary Ombudsman, a layperson, proposed a tentative recommendation based on opinions which favoured a relationship between the complainant's psychiatric condition and his work accident and history without constructing "a scientific basis for doing so." My Office's mandate is to review Appeal Board decisions and determine on the available evidence whether a reasonable decision has been made. To reach any conclusion, it is appropriate not only to review the actual material contained in a Board claim file, but to review the existing Board policies. In my opinion, the evidence is sufficiently clear to support a relationship between the complainant's psychiatric disability and the sequelae which developed because of his compensable injury.

The Board's 19 (3) Response #4

The Temporary Ombudsman finds it "inexplicable" that the Board should find the majority of the complainant's back pain as non-compensable. By way of explanation, the Appeal Board submits that the complainant's degenerative disc disease was not caused by the accident. In that sense, pain emanating from the degenerative condition cannot be considered compensable either. As you know, the claim was initially accepted for a lumbosacral strain. The diagnosis of degenerative disc disease was not made until approximately two years later (Dr. G, June 29, 1971). The strain recurred on several occasions, aggravating the degenerative disc disease each time. On each occasion, however, the recurrent strain subsided as did the associated symptoms of the aggravated degenerative disc disease. The 20% award that the complainant now receives is an attempt on the Board's part to recognize a propensity for recurrent strains and the aggravating effect it has on the underlying degenerative disc disease. It does not, however, attempt to recognize all of the symptomatology arising out of this progressive condition, as the condition is clearly not caused by the work injury. For instance, changes in the cervical spine as identified by Dr. N in his report of December 20, 1983, cannot in any way be considered related to the compensable problem.

My Comments #4

I am confused by the Board's statement that the 20% pension award was made to compensate the complainant due to his "... propensity for recurrent strain and the aggravating effect it has on the underlying degenerative disc disease".

It is my understanding, based on numerous previous comments by the Board, that pension awards are based on the permanent loss of bodily function. The organic award was granted to the complainant in recognition of a permanent 20% loss of total bodily function resulting from his compensable accident. Recurrent strains have been compensated by temporary total, or temporary partial benefits. Furthermore, I have noted that in the Appeal Board decision dated July 23, 1982, the Board recognized, and accepted as compensable, an aggravation of the complainant's degenerative disc disease. The Board, therefore, has implicitly accepted not only back pain which resulted from a compensable injury but also back pain because of the degenerative process. I am therefore of the opinion that the psychiatric condition which flowed from the complainant's back pain is also compensable.

The Board's 19(3) Response #5

The "general rule" quoted by the Temporary Ombudsman, should in his view, be "waived". This guideline was developed on the basis of independent scientific research and data well known in the medical community. It is an established medical fact, as opposed to medical opinion, that post traumatic neuroses develop within five years of precipitating trauma. In the vast majority of cases the neurosis develops within 18 months. I am aware that in February 1981, your staff requested and received a large volume of research data from Dr. F, the Board's Consultant Psychiatrist. All of this data supports the Board's policy with regard to the adjudication and evaluation of claims for psychiatric disability. This material, comprising in excess of 100 papers and documents, should be considered as forming a part of the Board's response to the Temporary Ombudsman's suggestion that the five year guideline be waived. At the same time, the Appeal Board would welcome an opportunity to review any research data you may be aware of, that is similar in scope and depth but which would tend to establish that either the five year guideline is unreasonable generally, or alternatively, that the circumstances evident in this case are such that failure to waive the five year guideline would be unreasonable.

My Comments #5

On July 20, 1984, my Office received from the Board 108 medical papers and studies. As you know, my staff does not include a resident psychiatrist nor did I think that it was appropriate to retain a psychiatrist to review the Board's medical submissions. Instead, the material was reviewed by members of my investigative staff. The results of the review revealed that the topics of the papers ranged from "Psychotraumatic Reactions" to "Occupational Health in Europe". The papers were published between 1953 and 1983. Furthermore, the papers submitted by the Board, in this case, do not address what I see to be the crucial issue: whether or not the sequelae of a compensable injury, demonstrated by exacerbations of back pain, may lead to the development of a psychiatric disability/condition.

I am not prepared to contend or dispute that the existing medical literature and research may in fact reveal that a neurosis usually develops within 18 months to five years. However, given the facts of this case, I am not persuaded by the above general statement. In this case, the medical evidence indicates that in 1979 the complainant was suffering from a reactive depression which was related to the compensable injury and the years of exacerbations.

The Board's general policy with respect to compensation for psychiatric disabilities recognizes that such disabilities will usually be apparent within five years of the injury or last surgical procedure. In my opinion, that part of the Board's policy should not prevent entitlement in a case where the disability is clearly and directly related to an injury and its sequelae. In the present case, it is my view that such a relationship has been established.

Recommendation

It is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that it was unreasonable for the Board to have denied the complainant's claim for psychiatric entitlement. I recommend, therefore, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision of July 23, 1982 and grant the complainant entitlement for a psychological disability which manifested in 1979, and is related to his compensable back injury and its sequelae.

This recommendation was included in a report to the Chairman dated January 31, 1985.

The Board had not responded to the report and recommendation by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter

to the Premier. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 18

This complaint against the Workers' Compensation Board was brought to the attention of this Office by a letter received on May 18, 1983. The complainant contended that the Appeal Board was unreasonable to confirm a 50% permanent disability award for his back disability. In a decision dated May 6, 1983, the Appeal Board found that the 50% pension adequately reflected the complainant's low back disability and that the complainant was not entitled to temporary total disability benefits after April 28, 1982.

On June 8, 1983, the Chairman of the Workers' Compensation Board was notified of our intention to investigate the complaint in accordance with the requirements of the Ombudsman Act. The Chairman was invited to provide a statement of the Board's position in relation to the complaint. On behalf of the Chairman, a reply was received from the Assistant Secretary, stating that the Board did not wish to make a statement at that time. Following receipt of this letter, the complaint was assigned to a member of my investigative staff. During her investigation, the investigator conducted a thorough review of the complainant's Workers' Compensation claim file supplied by the Board, as well as carefully considering the relevant legislation and policies of the Workers' Compensation Board in relation to the issue.

Our investigation to date has revealed that on January 31, 1963, the complainant, employed as a labourer with the accident employer, slipped on some grease on the floor as he turned to place a heavy tub on to a machine, lost his balance, and fell to the floor. The complainant received immediate medical attention for a twisting sprain to his lower back. The Board granted temporary total disability benefits from February 1, 1963 until February 25, 1963 and from May, 1963 until October, 1963 when the complainant returned to work at the accident employer.

From that time until 1982, the complainant received various periods of temporary total disability benefits for further back injuries in 1964 and 1968 and for continuing exacerbations. The employer provided the complainant with light duties whenever he was able to work.

The complainant was assessed by the Workers' Compensation Board on November 1, 1972 for a permanent disability award. He was granted a 10% pension from 1963 until 1970 and 20% from December, 1970. This was increased to 40% in February, 1974.

The forty per cent award was confirmed by the Board following reassessments in 1976, 1979, and 1980. The Board denied entitlement for psychological disability on the grounds that the complainant's emotional problems stemmed from his traumatic experiences as a prisoner of war during World War II and the Korean War.

Following an exacerbation in September 1981, the complainant's condition deteriorated. He discontinued work on September 15, 1981, and elected early retirement from the accident employer on November 1, 1981. All the examining physicians acknowledge that he had a significant physical disability and his previous work history indicates that had there not been an increase in his pain, the complainant would likely have continued working at the accident employer as he had in the past.

The complainant applied for an increase in his permanent disability award on the basis that his condition had deteriorated. After being reassessed by Dr. A on June 18, 1982, his pension was increased to 50%, on the basis that his condition had worsened following his previous examination on March 3, 1980.

The complainant appealed the 50% pension; however, the Appeal Board ruled that the 50% rating adequately represented the amount of organic disability the complainant had suffered.

During the course of our investigation, the Temporary Ombudsman formed the view that it might be open to him to conclude, pursuant to section 22(1)(b) of the Ombudsman Act, that:

... the Appeal Board was unreasonable in confirming the 50% permanent disability award. It is my tentative opinion that the medical evidence indicates that the complainant has virtually no flexibility in his spine and therefore his award should be at least in keeping with the minimum guideline of 60% provided for by the Ontario Rating Schedule. It is also my view the award should have reasonably exceeded those guidelines because of the complainant's inability to perform even the lightest competitive employment as verified by his treating physicians and employer.

In a letter dated February 13, 1984, the Temporary Ombudsman advised the Chairman of the possible conclusion and his consequent possible recommendation. In support of the possible conclusion and recommendation he pointed out that the complainant's medical condition did deteriorate significantly after 1981. In support of that statement, the Temporary Ombudsman referred to three medical reports contained in the Board's claim file including the June 21, 1982 report of Dr. A, a Senior Medical Adviser at the Workers' Compensation Board. Dr. A had stated:

... he does have significant disability on an organic basis. He was not able to stand erect and is in the forward flexed position. There is no movement of the spine for flexion, extension or lateral bending.

Dr. B, an orthopaedic surgeon, reported to the life insurance company on June 10, 1982 as follows:

... from an insurance aspect, this man must be considered totally disabled and will likely remain so for the foreseeable future.

Dr. C, the complainant's family physician since 1976, reported on October 15, 1982 that:

... the complainant has tried hard to continue working over the past several years in spite of his back pain. In his present condition, he is, in my opinion, not capable of performing even light work.

The Temporary Ombudsman also dealt with the question of entitlement for a psychological disability, which was noted by the Appeal Board. He concluded that the complainant's psychological condition, although operative, was not disabling, nor should it have been a factor in a determination of his permanent disability.

The Temporary Ombudsman's letter of February 13, 1984 went on to state that it may be open to him to:

... recommend, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision and award the complainant a permanent disability rating in accordance with all the medical and other evidence which will reflect the true nature of his disability bearing in mind the minimum guidelines.

The Chairman's response to that letter, dated April 24, 1984 stated in part that:

Having carefully reviewed all of the evidence on record in the context of the Temporary Ombudsman's submissions and the Ontario Rating Schedule, the Appeal Board cannot agree that its decision was unreasonable.

With regard to the Temporary Ombudsman's statement that the medical evidence establishes that the complainant has virtually no flexibility in his spine, the Chairman stated that the complainant has limited movement in his spine. Dr. A had reviewed her memo dated June 21, 1982 and stated that, "The sixth line of this paragraph should have

been qualified to indicate that there was no movement of the lumbar spine. It was never my intent to indicate that there was 'total immobility of the whole spine', as such a statement would be incorrect." (Emphasis added)

However, the Chairman went on to note that, although the complainant's spine was not completely immobile,

... it is clear that there is evidence of a severely limited movement in the lumbar spine. The Ontario Rating Schedule refers to a totally immobile spine as a guide only. In other words, such a condition would never be seen in the context of an industrial injury. Total immobility, with fusion of all of the vertebrae, might occasionally be seen in progressive disorders such as Marie-Strumpell spondylitis. Obviously, the complainant does not have total immobility of the entire spine and the 50% award, representing in excess of 80% of total immobility of the entire spine from occiput to sacrum, in the Appeal Board's view is reasonably proportionate to the amount of restriction he does have.

With regard to the Temporary Ombudsman's comment concerning the complainant's inability to perform even the lightest competitive employment, the Chairman stated:

... the Appeal Board points out that section 43(1) of the Workers' Compensation Act requires the Board to estimate the impairment of earning capacity "from the nature and degree of the injury" only.

The Chairman concluded that:

In view of all of the above, the Appeal Board will not take any steps to implement the Temporary Ombudsman's tentative recommendation.

Before reaching a final conclusion in this case, I have again carefully considered all of the factors involved, as outlined in the Temporary Ombudsman's letter of February 13, 1984 and reflected upon the Chairman's response to that letter.

I note that there is no disagreement between us on the medical evidence. I agree with the Chairman that the medical reports indicate severely limited movement of the lumbar spine. It is with regard to the question of compensation for the complainant's back disability that there is disagreement. The Chairman states that since the complainant does not have a totally immobilized spine, the 50% pension he receives is adequate compensation. I agree with the Chairman when he states that the Ontario

Rating Schedule refers to "a totally immobilized spine as a guide only." However, it is my opinion that the term "guide" should be interpreted in line with the Board's Policy Directives which are as follows:

Directive 2(1)

That the rating schedule be accepted as a guide for minimum levels for specified disabilities.

Directive 2(2)

That in every case emphasis must be placed on the individual factors being appraised and appropriate allowances made.

Although the complainant does not have a totally immobile spine, there are individual factors that argue for an increase in his permanent disability award. He has extremely limited movement in his spine as a result of an industrial accident. The Board itself stated that one would never find a totally immobile spine resulting from an industrial accident, but only from progressive disorders. From the time of his first accident in 1963 until 1981, the complainant continued working at the accident employer until 1981, whenever he was able and his employer several times gave evidence to the Board that the complainant was an excellent employee. I note that the Claims Adjudication Branch Procedures Manual, Document No. 33/20/01 states that, "Permanent disability cases which do not meet the general criteria should be individually judged and dealt with equitably and fairly, having regard for all the circumstances." the complainant's is a case where the doctrine of equity and fairness should be applied to grant him an increase in his pension.

The Chairman further commented, "The Appeal Board points out that section 43(1) of the Workers' Compensation Act requires the Board to estimate the impairment of earning capacity 'from the nature and degree of the injury' only." Again, I refer to the Board's Policies and Administrative Directives which state in Directive 1(2) and 1(3) that:

- (2) The Schedule is designed to show in percentages the approximate impairment of earning capacity in an average unskilled employee.
- (3) It is to be used only as a guide always having regard to whether the award adequately compensates the employee for his loss of earning capacity either at his own or some other suitable occupation.

Directive 1(3) suggests that we can also look to the complainant's loss of earning capacity. In the complainant's case, he would likely have continued working at this workplace of 29 years if the pain from his injury had not increased.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of May 6, 1983 was unreasonable to confirm the 50% permanent disability award. The Policy Directives indicate that the Ontario Rating Schedule is to be applied as a guide for calculating minimum levels for disabilities. The Board is not prevented from granting any percentage above the specified minimum level; that is, the schedule is a floor and not a ceiling for benefits. The medical evidence and the individual factors of the complainant's case argue for an increase in his permanent disability pension beyond 50%.

It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board revoke its decision, and grant the complainant an increase in his permanent disability pension in accordance with all the medical and other evidence to reflect the true nature of his disability.

My conclusion and recommendation were contained in a report dated December 4, 1984. On March 20, 1984, the Chairman of the Board advised me that the Board did not intend to accept my recommendation. In denying the recommendation, the Board relied on an early finding of the Select Committee on the Ombudsman that the Board was entitled to rely on its own medical experts with specialized knowledge in assessing the amount of permanent disability awards.

I did not consider this to be an adequate or appropriate response to my recommendation and on March 31, 1985, notified the Premier of my findings. The complainant was advised of the results of the investigation and the file was closed.

DETAILED SUMMARY NO. 19

The complaint against the Workers' Compensation Board was brought to the attention of this Office in a letter, dated December 6, 1983, from his representative. The complainant contended that an Appeal Board decision of April 25, 1983 was unreasonable to find that his 46% permanent partial disability award for organic disabilities to the low back, neck and left ankle, and his 30% three-year provisional psycho-traumatic award properly reflected the degree of disability resulting from his various accidents. He also contended that in its decision of October 27, 1983, the Appeal Board was unreasonable to find that the

information submitted by his community legal worker on September 1, 1983 would not cause it to vary, amend or revoke its decision of April 25, 1983 denying an increase in his total permanent disability award, or to grant a new hearing.

On January 5, 1984, the Chairman of the Workers' Compensation Board was notified of our intention to investigate the complaint in accordance with the requirements of the Ombudsman Act. The Chairman was invited to make a statement, if he wished, of the Board's position in relation to the complaint. In a response dated January 12, 1984, the Board declined to make a statement at that time. Our file on this complaint was assigned to a member of my investigative staff. During her investigation, the investigator conducted a thorough review of the complainant's claim file supplied by the Board, and carefully considered the relevant legislation, policy and practices of the Workers' Compensation Board in relation to the issue.

The investigation carried out by my Office has revealed that on April 18, 1963, the complainant had the first of a number of accidents which led to his being granted partial disability awards for organic disability. By April 23, 1982, the quantum of these awards reached 30% for his low back, 10% for his neck, and 6% for his left foot.

By September 10, 1980, it had become apparent that the complainant's psychological condition had been adversely affected by his physical disabilities, and he was assessed by Dr. A, a Board psychiatrist. Dr. A was of the opinion that the complainant's multiple injuries, loss of physical prowess, and resultant loss of self-esteem impaired his ability to function. A 15% non-organic partial disability award was granted.

On September 30, 1981, Dr. B, the complainant's attending psychiatrist, reported that he had first seen the complainant on May 27, 1981. Dr. B wrote:

He has suffered a tremendous loss of self-esteem in not being physically capable to work to support and raise his wife and children properly. He has felt increasingly more depressed, lost, confused, and often "wanting to just go home, lie down and close his eyes and to feel free from people".

With his current state of physical and resultant psychiatric disability:

(1) I do not feel that it is reasonable to expect the complainant to be able to return to the work force, even in a light duty capacity.

(2) the complainant, in addition to physical pain, suffers from a persistent depression and anxiety, that, in my opinion, are a direct result from his numerous work injuries and their physically disabling sequelae.

(3) the complainant's psychiatric state has not altered appreciably in the past year, despite individual and conjoint psychotherapy sessions (with his wife), and additional psychotropic medication which he requires under my supervision, ...

It is my considered opinion that the complainant should be awarded at least 55% (instead of 15%), for his psychological disability, in addition to his allowance for his physical disabilities.

At an Appeals Adjudicator hearing on December 2, 1981 it was recorded that the complainant had worked at a lumber company for a few hours a week during the summer of 1981 but had to stop the work because of his disability, and that he kept pigeons at home as a hobby. Subsequent to the hearing, the Appeals Adjudicator requested a review of the level of psychological disability, noting that there was no evidence of pre-accident psychological disability.

The complainant was examined by Dr. C, a psychiatrist, on January 18, 1982. Dr. C wrote:

I feel that the complainant is a man of bright normal or superior intelligence, who has been subjected to very severe and traumatic emotional hardship from his earliest years, but who has tried over a long period to overcome the difficulties with only moderate and temporary success. I think it is obvious that he has suffered from a severe and debilitating state of depression and anxiety, related to his compensable accident and his subsequent "loss of face" due to his inability to provide for his family, and aggravated by the out spoken criticism of his fellow Macedonians. I felt that he was a reliable informant and did not in any way attempt to magnify or dramatize his misfortunes. I do not see much prospect of his returning to the work force and would rate the degree of his non-organic disability at 30%. I would suggest that his rating be reassessed within three years.

On June 18, 1982 awards of 30% for a non-organic disability to be reviewed in three years, 30% for the lower back, 10% for the neck and 6% for the left foot, were allowed. The Appeals Adjudicator did not accept the claim of total disability.

On January 18, 1983 Dr. B wrote:

It is my considered opinion that the complainant is not yet well enough physically or mentally to engage in a rehabilitation programme, or, in any part time employment. The complainant is not physically and psychologically capable of any form of sustained light work. It appears to me, that because of the chronicity of his physical disability and poor response to treatment of his depression to date, the complainant will most probably remain permanently and totally disabled.

On March 29, 1983 an Appeal Board hearing was held. In a decision dated April 25, 1983 the Appeal Board noted and accepted that the complainant's psychotraumatic disability had decreased, that the disability was granted on the basis of aggravation, and there was no evidence that the complainant's compensable condition had deteriorated. The Appeal Board concluded that the 46% disability award (low back, neck and left ankle) and the 30% psychotraumatic award properly reflected the degree of the complainant's disability as related to his industrial accidents. The Appeal Board further concluded that it was not established that the complainant was totally permanently disabled.

On September 1, 1983 the complainant's representative asked that the Appeal Board decision of April 25, 1983 be reconsidered and a new hearing arranged, or that the complainant's disability be reviewed, perhaps by a Major Psychogenic Rating Committee. In arguing against the Appeal Board decision, the complainant's representative noted that the three reasons provided by the Appeal Board were incorrect. First, the Appeal Board had noted that the complainant's psychotraumatic disability had decreased, even though the only evidence pertaining to his psychological disability subsequent to the Appeals Adjudicator's decision was a letter of January 18, 1983 from Dr. B, who gave his opinion that the complainant would probably remain permanently and totally disabled. Second, the Appeal Board had noted that the psychotraumatic disability was granted on the basis of aggravation, although nowhere in the file is there any evidence that that was the basis; to the contrary, the Appeals Adjudicator noted that there was no indication of pre-accident psychological disability. Third, the Appeal Board had noted there was no evidence to prove that the complainant's condition had deteriorated to warrant disability awards greater than 76%. The complainant's representative countered that the issue of deterioration was irrelevant since the complainant was totally disabled and had been for some time, and the central issue was whether the complainant was entitled to more than 76%.

On October 27, 1983 the Appeal Board decided that the complainant's representative's letter of September 1, 1983 was not information

that would cause it to vary, amend, or revoke its decision of April 25, 1983 or to grant a new hearing.

During the course of my investigation, I formed the view that it might be open to me to conclude that the Appeal Board was unreasonable to conclude that the complainant was not totally disabled, and that the 46% organic and 30% psychotraumatic disability award properly reflected the degree of his disability as related to his industrial accidents.

In a letter dated August 1, 1984, I advised the Chairman of the possible conclusion and my consequent possible recommendation. In support of the possible conclusion and recommendation, I pointed out:

I have reviewed the Appeal Board's three reasons for denying the complainant's appeal. The first, that his psychotraumatic disability had decreased, appears to be incorrect. The last two psychiatrists' reports on file (from the Board Consultant and the attending psychiatrist) described him as disabled psychologically. They did not report a decrease in his psychotraumatic disability.

The second, that the psychotraumatic disability was granted on the basis of aggravation, also appears to be incorrect. The Appeals Adjudicator specifically noted that there was no indication of pre-accident psychological disability. The word "aggravated" was used in Dr. C's report of January 19, 1982 but referred to aggravation of the complainant's depression and anxiety by criticism of his peers, not to aggravation of a pre-existing condition by a compensable injury.

Third, the Appeal Board noted that there was no evidence to establish that the complainant's condition had deteriorated to a point where more than 76% should be paid. The reference to a deteriorating condition appears to be a "red herring" since the appeal was based on the argument that the 76% was insufficient to begin with, not that it had been adequate at one time and was now insufficient because the complainant's condition had deteriorated.

These three points were identified by the complainant's representative in a letter of September 1, 1983. The letter was sent to the Appeal Board asking it to reconsider its decision of April 25, 1983. An Appeal Board decision dated October 27, 1983 stated the information submitted would not cause it to reconsider its decision.

While the complainant's representative's letter did not provide new evidence for the Board to consider, nevertheless it demonstrated that the reasons given by the Appeal Board were questionable and provided a reasonable argument against the

decision. Given a reasonable argument, the Appeal Board ought to reconsider its decision.

My letter of August 1, 1984 went on to state that it might be open to me to recommend that the Appeal Board should revoke its decision of April 25, 1983 and recognize that the complainant is totally disabled, and grant him a permanent disability award to properly reflect his total disability resulting from his industrial accidents.

The Chairman's October 10, 1984 response to my letter of August 1, 1984 stated in part:

On Page 4 of your letter, you suggest that the Appeal Board was not correct in concluding that the complainant's psychotraumatic disability had decreased. The panel recalls very clearly that at the hearing, the representative conceded that the complainant's behaviour had improved.... The social worker's report of December 30, 1981 is also revealing, indicating that:

"At this time the complainant says he feels 'better' and that he tries 'to be happy'. He appears to have gone through some kind of acute episode in May, but now seems to be functioning better. He seems to be benefiting from his psychiatric treatment and has gained a fair amount of insight".

When the complainant's representative confirmed at the Appeal Board hearing that the complainant's behaviour had improved, his testimony, as recorded on page 25 of the Appeal Board hearing transcript, was similar to that of the social worker in describing the complainant as feeling and functioning better. The complainant's representative was recorded as saying:

The situation appears to be deteriorating as time goes on, unfortunately, and not improving that much although there was, it seems, when he started getting to Dr. B, things improved then, that's for sure, because there was all sorts of peculiar and bizarre behaviour being exhibited before that.

I think the record discusses that. I think the social worker has commented on times when he basically ran away from home, and that has improved, but the overall situation couldn't be said that there is much hope at the end of the tunnel here.

In both cases, that of the complainant's representative and the social worker, the comparison was with a previous time when the complainant had been displaying bizarre behaviour in which he became suspicious of his

family and hid in his garage. Both the representative and the social worker noted that the complainant was improved in that he was no longer displaying bizarre behaviour. However, the disappearance of florid symptoms and the gaining of insight do not necessarily mean that the complainant's disability had decreased to a level that would render him capable of returning to employment.

The Chairman's October 10, 1984 letter also stated:

Furthermore, the panel noted that he had returned to work, albeit for a short duration, during the summer of 1981. This suggested to the Appeal Board that he was not totally disabled.

At the Appeals Adjudicator hearing on December 2, 1981, it was noted that the complainant worked in a lumber yard for a few hours per week for two to three months, earning approximately \$800. However, testimony indicated that he was unproductive and had to leave because of his disability. The social worker's report of December 30, 1981 noted that the complainant attempted to return to work picking apples but made very little money because his productivity was low. The complainant then attempted to work as a dishwasher but was fired for medical reasons. It would appear that the complainant's attempts to find employment did not, in fact, indicate a decrease in his disability. To the contrary, they demonstrate quite clearly that, although he was willing to try, he was incapable of holding down a job.

The Chairman's October 10, 1984 letter went on:

Finally, the panel suggests that careful attention be given to the reports of Dr. D, Dr. A and Dr. C as further support for the panel's finding that the psychiatric condition appears to have undergone some improvement.

I note that on September 16, 1975, Dr. D diagnosed a chronic anxiety depression and rated the complainant's disability at 10% for an ulcer and 15% for the chronic depression. On September 10, 1980, Dr. A rated the complainant's non-organic disability at 15%. On January 18, 1982, Dr. C diagnosed severe, debilitating depression and anxiety and rated the complainant's disability at 30%. A progression from a 15% to a 30% disability rating does not indicate improvement on any scale.

The Chairman's letter of October 10, 1984 went on to say:

The Appeal Board also had regard for the complainant's personal history, which included his father's suicide, an ulcer condition, a deprived childhood, a "forced" marriage, all of which were factors which contributed to his personality development. Dr. A and Dr. C stated that the "loss of face" subsequent to the accident, aggravated by the criticism of fellow

Macedonians, should not be considered compensable. While admittedly this "aggravation" occurred after the compensable injuries, it was nevertheless a completely non-compensable entity and, if sufficient to increase the level of disability, should not be reflected in the benefits awarded under the Workers' Compensation Act. Notwithstanding this, the panel points out that the complainant's award for psychiatric disability was not reduced by reason of any pre-existing or underlying propensity for the development of psychiatric problems.

Neither Dr. A nor Dr. C stated that the complainant's loss of face should not be considered compensable. Dr. A wrote on September 10, 1980:

The patient has been rated as having a 35% organic impairment as of May 1980. In addition, it is my opinion that the multiple nature of the injuries and the resultant loss of self esteem due to loss of physical prowess have created a psychological factor which further impairs the man's ability to function.

I recommend that psychiatric entitlement be accepted....

Dr. C wrote on January 19, 1982:

I think it is obvious that he has suffered from a severe and debilitating state of depression and anxiety, related to his compensable accident and his subsequent "loss of face" due to his inability to provide for his family, and aggravated by the out spoken criticism of his fellow Macedonians.

Both psychiatrists noted the complainant's unfortunate history, but were clear that his psychotraumatic disability was a consequence of his compensable accidents, not of his personal history in general.

The Chairman's letter of October 10, 1984 also stated:

Your final concern dealt with the panel's finding that there was no evidence to establish a deterioration in the complainant's condition beyond the 76% permanent disability level recognized. The Appeal Board submits that it reasonably reached this conclusion on the evidence available, which included the opinion of physicians in the Medical Branch. Implicit in this, is the conclusion that the 76% award was an adequate reflection of disability residual to the complainant's compensable injuries.

The Appeal Board makes no mention of the evidence of Dr. B, the complainant's attending psychiatrist, who wrote on January 18, 1983 that

the complainant would most probably remain permanently and totally disabled. Dr. B's report would appear to be strong evidence that the complainant was disabled more than 76%.

The Chairman's October 10, 1984 letter also stated:

One final point stressed by the Appeal Board, is that the panel met with the complainant on a person-to-person basis, and therefore considers itself at an advantage in considering the broad question of the extent of his disability. On the basis of the evidence and their observations, the Appeal Board was not convinced that the complainant was totally disabled. The Appeal Board notes that your tentative conclusion and tentative recommendation are based simply on a review of a photocopy of the Board's file.

The evidence referred to in the letter appeared to be that of the complainant's representative, the social worker, Dr. D, Dr. A, Dr. C, and Dr. E, a general surgeon. In light of the foregoing comments about the medical evidence presented, it might seem that the Appeal Board reached incorrect conclusions about most of the evidence. Of even greater importance is the total lack of reference by the Appeal Board to the opinion of Dr. B. Particularly in light of the strong opinion rendered by Dr. B that the complainant was totally disabled, it is surprising that the three lay members of the Appeal Board panel would consider their person-to-person meeting with the complainant at the hearing as giving them an advantage in considering the extent of his disability.

The final paragraph of the Chairman's October 10, 1984 letter stated:

On the basis of the investigation thusfar conducted by your office, the Appeal Board cannot agree that its decision was unreasonable, and consequently, the panel does not intend to give effect to your tentative recommendation.

On November 26, 1984, Dr. B wrote another report which was sent to the Board by the complainant's representative. The letter read in part:

Psychologically and emotionally he has reached a chronic "bottomed-out" state. His major depression continues to be unimproved and chronic. At times he entertains suicidal ideas which he fights, because of his Christian religion. He totally lacks self-esteem, and feels useless and emasculated because of his inability to work.

In my opinion, the complainant has not improved physically or emotionally, and I cannot see how it would be possible for him

to ever undertake any form of employment. Whenever anyone has criticized him because of this, he becomes close to the brink of an acute psychotic breakdown with paranoid features. ... the complainant's physical, mental, and social failures,... he regards as shameful and ... he feels very sensitive [about them]. His back and both legs continue to be chronically severely painful and he is certainly not able to "enjoy life."

It is therefore, my considered opinion, that the complainant is a legitimate candidate for, and should be awarded a 100% pension at this time, and for the remainder of his life.

Before reaching a final conclusion in this case, I have again carefully considered all of the factors involved, as outlined in my letter of August 1, 1984 and reflected upon the Board's response to that letter. I am of the view that the Chairman's response does not constitute a significant refutation of the information outlined in my letter of August 1, 1984, in support of my possible conclusion and recommendation. There is no evidence that the complainant's psychotraumatic disability had decreased to a level which would permit him to return to work; the Board psychiatrists did not consider the complainant's loss of face to be non-compensable; and, most importantly, the Appeal Board apparently failed to consider Dr. B's evidence supporting the complainant's claim of total disability when it concluded that the 76% award was an adequate reflection of disability residual to his compensable injuries.

Accordingly, it is my opinion, pursuant to section 22(1)(b) of the Ombudsman Act, that the Appeal Board decision of April 25, 1983 was unreasonable to conclude that the complainant was not totally disabled, and that the 46% organic and 30% psychotraumatic disability award properly reflected the degree of his disability as related to his industrial accidents. It is, therefore, my recommendation, pursuant to section 22(3)(g) of the Ombudsman Act, that the Appeal Board should revoke its decision of April 25, 1983 and recognize that the complainant is totally disabled, and grant him a permanent disability award, with arrears to February 27, 1981, three months prior to when he first attended Dr. B, to properly reflect his total disability resulting from his industrial accidents.

This recommendation was included in a report to the Chairman dated January 21, 1985.

The Board had not responded to the report and recommendation by March 29, 1985. I therefore determined that a reasonable length of time had passed without any action on the Board's part and reported the matter to the Premier. The complainant was advised of the results of the investigation and the file was closed.

APPENDIX A

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	CONSIDERED IN SELECT COMMITTEE REPORT NUMBER	RECOMMENDATION DENIED	RECOMMENDATION OF COMMITTEE	PRESENT STATUS	App. A page 1
11	10	12, Rec. 2	That the Minister cancel his decision to accept the adjudicator's recommendation not to pay the complainant's claim for interest; that the Minister accept and consider the claim as one properly made under the Public Works Creditors Payment Act.	That the Minister of the Environment accept in principle that the Crown may, in the appropriate circumstances, pay a claimant interest due pursuant to a term of a contract with a contractor; that the Minister consider the merits of the complainant's claim for interest owing on the principal amount in question and formulate a decision whether or not to pay the claim.	The Deputy Minister has advised the Select Committee and the Ombudsman that he has considered the viability of paying interest and legal costs to the complainant and concluded the Crown should not pay the interest or legal costs in this matter.	
2	60	3, Rec. 34	That the Ministry pay the complainant the sum of \$1,318.00 for his losses and legal expenses.	That the Audit Act and the Financial Administration Act be amended to provide that when such a recommendation is made by the Ombudsman after all necessary and appropriate requirements of the Ombudsman Act have been adhered to by his Office, and when entirely accepted by the governmental organization, "a lawful authority" is created for such money to be paid by the governmental organization out of the Consolidated Revenue Fund. Further, that the Ombudsman's Office and the Ministry of Government Services resume their discussions on the merits of the Ombudsman's recommendation and that the results of these discussions are to be reported to the Select Committee.	The Ministry of Treasury and Economics has responded and proposed that the Ombudsman Act is the more appropriate statute for the amendment, since the purpose of the amendment directly relates to procedure under that Act. The Ministry proposed that the Ombudsman Act be amended as follows: "Where the Ombudsman, in a report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to reimburse the complainant for an ascertainable financial loss suffered by him in the matter complained of, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at	
		11, Rec. 4				

MINISTRY OF GOVERNMENT SERVICES

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	SELECT COMMITTEE REPORT NUMBER	RECOMMENDATION OF COMMITTEE	PRESENT STATUS

MINISTRY OF GOVERNMENT SERVICES
(cont'd)

				<p>report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to compensate the complainant for an ascertainable financial loss suffered by him, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum shall, where it is less than \$1,000 and has been ascertained as required by this section, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is \$1,000 or more, it may be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned."</p>	<p>the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum may, where it is less than \$1,000, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is \$1,000 or more, it may be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned."</p>
				<p>The amendment will be included in the package of amendments to the <u>Ombudsman Act</u>.</p>	
			12, p. 16	<p>The Committee noted that the Attorney General has stated that recommendations for these amendments to the Act would be placed before Cabinet. The Committee expects to be dealing with them in the near future.</p>	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	CONSIDERED IN SELECT COMMITTEE REPORT NUMBER	RECOMMENDATION DENTED	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
MINISTRY OF LABOUR					
<u>Workers' Compensation Board</u>					
9	22	10, Rec. 14	That the Appeal Board reconsider its previous decision with a view to granting the complainant a temporary supplement to his permanent partial disability, on the basis of a full consideration of the appropriate test for entitlement to such benefit. That the Board provide reasons for its decision following the reconsideration.	"The Workers' Compensation Board reconsider its decision of July 24th, 1980 and its decision of November 9th, 1981 with a view to granting the complainant a temporary supplement to his permanent partial disability award on the basis of a full consideration of all relevant evidence and factors."	The Board advised the Committee that it had accepted the recommendation in the tenth report and issued a decision dated September 20, 1983. In that decision, the Board purported to have considered all the relevant factors, but again denied entitlement to a supplement under section 43(5) of the Act.
		11, Rec. 2		That the Workers' Compensation Board reverse its decision of September 20th, 1983 and grant the complainant a temporary supplement to his permanent partial disability award.	During the hearings before the Committee in the summer of 1983, the Ombudsman asserted that although the original language of his recommendation was lacking in precision, it was clearly his intention that the Board grant the complainant benefits. In the Ombudsman's view, the Board had continued to deny the recommendations of both the Committee and the Ombudsman.
					Following these deliberations, the Committee in its Eleventh Report made a further recommendation that benefits be awarded.
					After further discussions with the Ombudsman's Office, the Board granted the injured worker a supplement for one year amounting to approximately \$950. The Committee must now decide if its recommendation has been implemented.

APPENDIX B

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22 (3) (d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
2	47	MINISTRY OF EDUCATION That a more comprehensive insurance policy be made available to students, one which would provide compensation for injuries resulting in the loss of future earning power.	May 4, 1977	The Deputy Minister took steps to meet with insurance industry representatives regarding more comprehensive insurance for students.	3, Rec. 23	That the Ministry forthwith pursue its discussions with the insurance industry and other interested parties for the purpose of developing an appropriate contract of insurance in the indemnity type at a realistic premium which would adequately compensate a pupil for injuries sustained in the case of a pure accident as the result of participation in shop classes and in organized athletic activities.	The Ministry has amended s. 8(1)(1) of the Education Act as follows: "The Minister may (1) prescribe the conditions under which and the terms upon which pupils of boards shall be deemed to be employees under the Workers' Compensation Act, deem pupils to be employees for such purpose and require a board to reimburse Ontario for payments made by Ontario under that Act in respect of a pupil of the board deemed to be an employee of Ontario by the Minister." The Ministry is engaged in discussions with an insurance consulting firm in order to settle on feasible options for insurance coverage.
					11, Rec. 3	That recommendation 23 of its Third Report be implemented by the Ministry of Education by means of a policy of insurance on a province-wide basis before the end of 1984.	
					12, p. 9	The Committee urged the Ministry to move quickly and said it expected the recommendation to be implemented before its next hearings.	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22(3) (d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	APP. B Page 2 PRESENT STATUS
2	57	<p>That the Public Service Superannuation Act be amended in order to eliminate all restrictions on the re-employment of provincial superannuates except where the nature of their re-employment is such that they resume contribution to the Public Service Superannuation Fund.</p>	May 31, 1976	<p>Executive Secretary of the Civil Service Commission agreed to recommend to Management Board of Cabinet changes in the Public Service Superannuation Act.</p>	3, Rec. 24	<p>That the Ministry table appropriate legislation in the Legislature during the current session removing the present restriction on the total current earnings of a provincial superannuate.</p>	<p>Amendment to s. 16 of the Public Service Superannuation Act is currently being prepared by the Benefits Policy Branch of the Civil Service Commission and is expected to be before the Legislature next session. The amendment has been delayed, with proposed changes to other pension plans, until the governmental review of the pension industry is completed.</p>
					11, p. 20	<p>The Committee made no recommendation but urged that Ministry and government table the amendment as quickly as possible.</p>	<p>It was subsequently decided not to proceed with the proposed amendment. This issue is seen as part of the larger issue of mandatory retirement age in light of the Canadian Charter of Rights and Freedoms. The effects of abolishing a mandatory retirement age are being studied by the Ministries of the Attorney General and Labour.</p>
					12, p. 14	<p>The Committee made no recommendation but commented that it is not clear why a projected analysis of mandatory retirement should halt progress on the Committee's recommendation; the Committee said it will</p>	

MINISTRY OF
GOVERNMENT SERVICES

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22 (3) (d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN SELECT COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	App. B Page 3 PRESENT STATUS
<u>MINISTRY OF GOVERNMENT SERVICES (cont'd)</u>							
<u>MINISTRY OF HEALTH</u>							
3	40	That: 3) The Nursing Homes Act, 1972, be amended in order that provision be made for the successful candidature for the construction of a new home to make application for a conditional licence immediately upon the making of the award to him. This licence should be conditional on compliance with the terms of the proposal and any subsequent stipulations imposed by the Ministry prior to the granting of an unconditional licence.	May 4, 1977	Agreed to implement recommendation.	5, p. 32	continue to pursue the matter with the Ministry until the amendment is passed.	Necessary amendments have yet to be enacted. The Ministry proposed an interim arrangement whereby on any call for proposals the Ministry will undertake to the successful proposer that he be awarded a licence provided he constructs and establishes with the home in accordance with the Nursing Home Act and regulations. This interim arrangement was acceptable to the Ombudsman.
					11, p. 21	The Committee considered this complaint for the purpose of following up with the Ministry as to the implementation of the Ombudsman's recommendation as set out at pages 177 and 178 of the Ombudsman's Third Report. The Committee accepted the interim arrangement on the understanding that the Act will be amended at some time in the future.	
					12, p. 15	The Committee noted that it is still awaiting amendments to the legislation and will continue to monitor the Ministry's response to its recommendation.	

CA2 ØN
ØM
- A56



THE OMBUDSMAN OF ONTARIO

ANNUAL REPORT
1985-86



The Ombudsman | Ontario

DANIEL G. HILL
OMBUDSMAN

125 QUEEN'S PARK, TORONTO, ONTARIO
M5S 2C7
TELEPHONE (416) 596-3300

June 18, 1986

The Speaker
Legislative Assembly
Province of Ontario
Queen's Park
Toronto, Ontario

Dear Mr. Speaker:

It is an honour and a pleasure to present the Thirteenth Annual Report of the Ombudsman for the period April 1, 1985 to March 31, 1986.

This report is submitted pursuant to section 12 of the Ombudsman Act.

Yours sincerely,

Daniel G. Hill

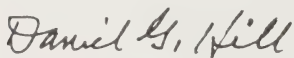
I intend to place added emphasis on systemic investigations and a broader view of complaints. I am pleased that the Standing Committee on the Ombudsman has continued to encourage me to bring systemic problems to its attention and later in this report I will outline three special projects in this regard.

I thank the Standing Committee for its excellent cooperation and support of my efforts. The Committee's thirteenth report is a high-water mark in the relationship between this Office and the Legislative Committee on the Ombudsman. I am in full agreement that the change from a Select to a Standing Committee creates a greater degree of permanence and stability to the entire Ombudsman process and I also commend the Legislature for this action. I am particularly pleased that the Committee has agreed to consider the question of expanded jurisdiction. My staff and I will be at its disposal to assist in its deliberations.

I also wish to express my appreciation to Ontario's civil servants. Without their continued cooperation the Ombudsman's efforts cannot be successful. I commend the commitment and professionalism that is so generally prevalent among our public officials.

I also express my gratitude to my excellent and able staff. The people of Ontario can be proud of the men and women of this Office who work so hard on their behalf.

During the past year I have become more than ever convinced of the utility of the Ombudsman's Office in advancing social justice for all Ontario citizens. I am honoured to serve as Ombudsman of Ontario and I renew my commitment to take positive and constructive action in all my endeavours.

A handwritten signature in cursive script, reading "Daniel G. Hill". The ink is dark and the signature is fluid, with a prominent loop at the end of the last name.

Daniel G. Hill

HIGHLIGHTS

This is the thirteenth occasion for tabling an Annual Report in the Legislative Assembly. The report deals with the activities of the Ombudsman's Office from April 1, 1985 to March 31, 1986.

- This report is divided into two parts. Part I is an overview of the operations of the Ombudsman. Part II deals with recommendations made by the Ombudsman that were denied by various governmental organizations.
- A major improvement is reported in the time it takes to close jurisdictional complaints. (p. 5)
- The Directorate of Regional Services has been expanded to make the Ombudsman more accessible. This initiative includes the placing of Field Officers in Windsor, London and Sault Ste. Marie. (pp. 5 to 6)
- Our public education program has implemented a Reasonable Access Policy for Office of the Ombudsman materials which includes the transcription of our Equal Times newsletter into Braille. (p. 6)
- An Employee Grievance Procedure has been implemented. (p. 7)
- A secondment program with the Ministry of Correctional Services has been initiated. (p. 7)
- The progress of our ongoing governmental liaison committees to resolve issues and reduce confrontation is outlined. (p. 8)
- Three special projects involving systemic problems with the Workers' Compensation Board, services for the developmentally handicapped and rent-geared-to-income housing in Moosonee are introduced. (pp. 9 to 10)
- Concern is expressed about the impact of the implementation of the *Young Offenders Act* on the availability of institutional services for young offenders. (p. 10)
- Concern is also expressed about the disparity in conditions for inmates in correctional facilities with particular emphasis on the Barrie Jail. (p. 10)
- Comments are made on five important but unresolved issues in the Social Benefits and Justice policy fields. (pp. 11 to 12)
- Comments are made on financial compensation for complainants. (p. 13)
- Two urgent special reports were tabled with the Speaker of the Legislative Assembly. (p. 12)
- The Canadian Ombudsman Committee on Child Protection is formed. (p. 13)
- Statistical information presented includes the disposition of all complaints closed by this Office in fiscal year 1985-86. (pp. 29 to 32)
- Budgetary expenditures are presented. (p. 32)
- Four cases are reported where the governmental organization refused to implement the Ombudsman's recommendations. (pp. 33 to 45)

TABLE OF CONTENTS

PART I	Page	PART II	Page
Ombudsman's Message	1	Introduction	33
Highlights	3	Detailed Summary No. 1 – Ministry of Education	33
Introduction	5	Detailed Summary No. 2 – Workers' Compensation Board	37
Fiscal Year 1985-86	5	Detailed Summary No. 3 – Workers' Compensation Board	40
Regional Services	5	Detailed Summary No. 4 – Workers' Compensation Board	43
Public Education	6	Ontario Ombudsman Staff	46
New Appointments	6	Language Facilities	47
Performance Appraisal	7	Ontario Ombudsman Offices	47
Grievance Procedure	7	Members of the Standing Committee on the Ombudsman	48
Staff Training and Development	7		
Secondment Program	7	APPENDIX A	
Ongoing Governmental Committees	8	Recommendations Denied Tables	49
Investigative Reorganization	8	APPENDIX B	
Ombudsman Investigators' Workshop	9	Recommendations under Section 22(3)(d) or (e) as Tables	55
Special Projects Involving Systemic Problems	9		
The Workers' Compensation Board and Psychotraumatic Entitlement	9		
Services for the Developmentally Handicapped in Ontario	9		
Rent-Geared-To-Income Housing in Moosonee	9		
Institutional Investigations	10		
Unresolved Issues	11		
Social Benefits	11		
Health			
Amendments to the Family Benefits Act			
Justice	11		
Re Ombudsman and the Ontario Labour Relations Board			
Financial Institutions			
Public Trustee			
Workers' Compensation Board			
Systemic Problems	12		
Special Reports	12		
Financial Compensation for Complainants	13		
The Canadian Ombudsman Committee on Child Protection	13		
Selected Case Summaries	14		
Statistical Information	29		
Budget Expenditures	32		

INTRODUCTION

This annual Report covers the fiscal year from April 1, 1985 to March 31, 1986. The report has been divided into two parts.

Part I provides an overview of our last fiscal year and includes a selection of case summaries which illustrate the varied complaints that come before the Ombudsman.

Part II is devoted entirely to detailed summaries of recommendation denied cases and tables of all recommendations outstanding from past reports.

Fiscal Year 1985-86

In commenting on the past fiscal year, 1985-86, I am pleased to report that our trend toward greater efficiency has not diminished. The number of complaints and information requests closed in the past fiscal year has increased from the previous year to an all-time high of 14,210. This includes 5,235 jurisdictional complaints, 6,266 non-jurisdictional complaints and 2,709 information requests.

The average duration to close the 5,235 jurisdictional complaints was 113.2 days. Last year I reported to the then Select Committee on the Ombudsman that the average duration to close the 5,366 jurisdictional complaints in fiscal year 1984-85 was 229 days. It would not be entirely accurate to say that we have cut the average duration time to close jurisdictional complaints by almost one half, because the average duration number for fiscal year 1984-85 was generated by our old data collection system and may well have been overestimated due to accuracy problems within the system. However, the average duration number for fiscal year 1985-86 was generated by our new computer system and I am assured is very accurate. Still, I am pleased to report that we have achieved a significant improvement in the time it takes to close jurisdictional complaints over last year and I am convinced that this trend will continue.

In August 1985 the Office installed a new computer system to replace our outdated word processing systems. The new system provides many enhancements to the reporting and data collection functions required by the Office, as illustrated above.

Specifically, management reports have been improved to allow for easy identification of problem files, and data collection procedures have been revised to identify bottlenecks in order to pursue corrective action and assist in expediting case processing. In addition, the data collection facilities formerly provided by the University of Toronto have been transferred to our in-house system producing a significant cost reduction.

Our new system has just recently become fully operational and in my next annual report I will be able to give effect to the suggestion given in the Standing Committee's recent thirteenth report that the Ombudsman list a category of current investigations that are being delayed by factors outside of his control.

Regional Services

During the past fiscal year regional services were a special priority for this Office. The Directorate of Regional Services was enhanced with the appointment of a new Director, a Supervisor of Field Services, and four additional staff members.

Part time field officers were hired for Windsor and London to serve as initial complaint handlers and community liaison officers. Another officer will be recruited for Sault Ste. Marie in the very near future.

It is presently beyond the resources of this Office to open additional district offices and I am hopeful that the concept of part time staff members in under-served areas will prove most effective in making our services more accessible.

This Program is on a pilot-project basis and will be carefully evaluated to determine future growth and direction.

The new Regional Services Directorate has embarked upon an active community outreach program. Each of the regional, district and field officers is engaged in a careful strategy aimed at making the services of our Office known to a large variety of community based groups, such as those representing the elderly, the handicapped, visible minorities, Native people, labour and students, to mention a few. In this manner a network will be fostered which will extend knowledge and use of our services throughout the province.

During the past year our Native Programs initiative has been incorporated into Regional Services and has been dramatically expanded with the assistance of our Native Programs Officer.

I cannot list the more than 200 Aboriginal organizations throughout Ontario contacted in the last year, but I am pleased to report some of the highlights of our Native outreach activities.

- With the Sault Ste. Marie Indian Friendship Centre, our Office co-hosted the first Aboriginal Conference on the Ombudsman, May 9, 1985. Over 100 Native representatives took part.
- Our Director of Regional Services and two staff members visited isolated reserves in the Moosonee, Attawapiskat, Winisk and Fort Severn region of Northern Ontario.
- I personally visited the Sault Ste. Marie Indian Centre, N'Amerind Centre in London, Can-Am Indian Friendship Centre in Windsor, the Thunder Bay Indian Centre and the Native Canadian Centre in Toronto.

Perhaps our most important initiative last year was the expansion of services to Native incarcerated. In response to the number of Native inmates in provincial correctional facilities and in conjunction with the Ontario Native Council on Justice our Office organized a two-day workshop at the Native Canadian Centre in Toronto. This special project included representatives from the Ministry of Correctional Services, the Ontario Federation of Indian Friendship Centres, five Indian Friendship Centres who sponsor Inmate Liaison Worker Programs, two representatives from Native Sons Groups within the correctional system and our own Institutional Investigations team.

The workshop was very well received by all participants.

I am encouraged by the support this Office receives from Native organizations and I will continue to improve our accessibility for Aboriginal people in this province.

Public Education

I am pleased to report that the Directorate of Communications and Public Education is continuing to make the services of this Office better known to all Ontarians.

The Directorate has been strengthened by the addition of an experienced senior officer and educational initiatives have been greatly expanded.

In keeping with recent federal government guidelines, I have adopted a Reasonable Access Policy for Office of the Ombudsman materials. Individuals who are unable to read or use regular print materials because of physical disability may contact the Communications and Public Education Directorate to request that the materials be transcribed into an accessible medium. Every reasonable step will be taken to ensure that access is provided.

The first step in this policy has been the transcription of our Equal Times newsletter into Braille.

Other initiatives have included a new bilingual pamphlet entitled "How Your Ombudsman Can Help You". Our multilingual fact sheets, now in 8 languages, have been expanded to include Cree. Five mobile information display units are now in circulation throughout the province. A roster of public speakers in the Office has been organized to handle the increasing number of requests for speaking engagements and invitations to attend community functions.

Finally, a stronger emphasis has been placed on working closely with community organizations. For example, an all-day conference on the role and function of the Ombudsman was held for 60 representatives of the province-wide community legal clinic system in cooperation with the executive officers of Community Legal Education Ontario.

In this regard we have also acquired observer status in a number of community groups including the City of Toronto and City of North York's Mayors' Committee on Race Relations.

New Appointments

As part of my overall Office reorganization, I have made the following appointments to my senior operating staff:

Director of Investigations – Gail Morrison
Director of Regional Services – Harvey Savage
Assistant Directors:
– Justice, Licensing & Labour – Paula Boothby
– Workers' Compensation – Martha Keil
Personnel Officer – Joan Harrison

In addition, with the introduction of the new regional field officer program, I have appointed the following persons:

Supervisor, Field Officer Program – Robin Rowe
Field Officer, Windsor – Pamela Young
Field Officer, London – Jackie Yuen

I have made one additional appointment to the Directorate of Communications and Public Education:

Senior Communications and Public
Education Officer – Karen Wheeler/McSweeney

Performance Appraisal

In September 1985, the new performance appraisal program became effective. The system is three-tiered. The first tier involves meetings between the manager and each employee, individually, to review their job description so that there is a mutual understanding of the responsibilities, objectives and results expected.

The second tier is a six-month to one-year ongoing review process, where the manager observes the employee's daily activity and discusses any specific problems on the spot so that the employee is aware of any difficulties he/she may be having over the course of the review period.

The third tier consists of a meeting, at the end of the review period, between the manager and employee to discuss the employee's work during the review period, using the objectives set and results expected that were outlined in the first tier, as the basis for the appraisal. New objectives are then reset for the coming review period.

By the end of April 1986, we will have completed our first three-tier phase with all employees.

I am hopeful that this new system gives employees a better understanding of their jobs and what is expected of them.

Grievance Procedure

I have now implemented an Employee Grievance Procedure, effective April 1, 1986.

To assist in the implementation and functioning of the process, an elected Employee Committee works with a comparable Management Committee to discuss any problems which may arise.

The Grievance Procedure commences with informal discussions between the employee and the supervisor about the complaint. It moves through three steps to a final stage, where, if no resolution has been reached, an outside arbitrator is appointed to make a final decision.

I am pleased to report that this is the first Canadian Ombudsman's Office to adopt a formal grievance procedure for its employees.

The procedure is a one-year pilot project so that employees and management will have time to adjust any problem areas in the present process.

I am confident that the Grievance Procedure's implementation will go a long way to improving working relationships within the Office of the Ombudsman.

Staff Training and Development Programs

In October 1985, an Orientation Training Program was completed to assist new staff in adjusting to their jobs more readily. The program entails documentation, an orientation seminar, job introduction, and follow-up.

In December 1985, support staff from our District and Regional Offices each spent a week in Toronto participating in an in-depth training program tailored to their needs. One half day was devoted to assisting them in developing techniques for dealing with difficult complainants.

Because of its success, the program was expanded for the benefit of Investigators and Investigative Researchers. As a result, on February 24 and 25, 1986, two one-day seminars were conducted in house on "Practical Techniques for Dealing with Difficult Complainants".

In addition several education seminars were conducted for staff whereby guest speakers were brought in to speak on various topics. These speakers represented Community Legal Education Ontario, The Ontario Women's Directorate, Chiropractic Care, Post-traumatic Psychological Disabilities, Building Safety and Security, Occupational Stress and Stress Management.

Finally, to develop job related skills a number of staff attended various staff development seminars and courses conducted by such organizations as, the Civil Service Commission, MICA, Network for Learning, Wang and various Community Colleges.

Secondment Program

In an effort to give employees of our Office and of the Ministry of Correctional Services an opportunity to expand their experiences, we have begun a secondment program with the Ministry of Correctional Services.

In June 1986, a staff member from the Ministry will be seconded for a one-year period to the Ombudsman's Office. At the end of the year, the process will be reversed and a member of the Ombudsman's staff will be seconded to the Ministry of Correctional Services.

This is the first time a program of this kind has been attempted by my Office. I am convinced that it will assist our two agencies in learning more about each other.

I am hopeful that, if it succeeds, we can make similar reciprocal arrangements with other Ministries and Boards of the government. The more we know about each other, the better we can function.

Ongoing Governmental Committees

In last year's Annual Report, I outlined a new initiative involving the establishment of a committee of senior officials from the Ministry of Correctional Services and the Ombudsman's Office that would meet on a regular basis to discuss mutual concerns and settle, where possible ongoing cases.

The cooperation and sincere efforts of the Ministry's committee members have resulted in some notable agreements being reached by the committee which include:

- An Amendment to Regulation 649 under the *Ministry of Correctional Services Act* giving inmates the right to earn bank interest on monies held in trust by the Superintendent of an institution.
- A policy change allowing inmates undergoing close confinement, as punishment for an institutional misconduct, to continue to earn remission providing that they apply themselves industriously to the program while serving their punishment.
- A policy to limit the use of special diet as punishment for institutional misconduct.
- The formation of a special committee to study in depth the Ministry's Incentive Allowance Program for inmates.

Because of the encouraging success of this process and with the cooperation of the new Chairman of the Workers' Compensation Board, Dr. Robert Elgie, we have established a similar ongoing committee of Workers' Compensation Board officials and Ombudsman senior staff. I am pleased to report that this Committee has helped to resolve a number of very difficult and long-standing cases.

In a new spirit of cooperation, Dr. Elgie has this year instituted the "Committee to Review Appeal Board Decisions". This three-member Committee, working in tandem with three of my senior staff, considers our 19(3) and 22(3) submissions. I am pleased to report that a cooperative and open-minded exchange of ideas has resulted from the work of this new Committee. We have in some instances avoided protracted paper disputes and resolved matters to the early benefit of the workers involved.

The Committee has had profitable discussions with my staff regarding the length of time the Committee needs to review our submissions. We have every assurance that the Committee will proceed more expeditiously, in the future, while still maintaining its quality of attention to the issues.

In addition, I have had discussions with the Minister of Housing, the Honourable Alvin Curling, and the newly appointed Chairman of the Ontario Housing Corporation, Mr. David Greenspan, that have resulted in the establishment of a liaison group of Ombudsman officials to work with senior Ontario Housing Corporation officials.

As a result of the positive achievements by these committees, I intend to expand my efforts to form similar groups in other Ministries in the coming year.

Investigative Reorganization

In my last Annual Report, I outlined the organization of a new administrative structure. This structure is composed of five Investigative teams, and one Intake and Information team. Each Investigative team handles a particular group of policy fields, and develops special expertise in these areas. Each is headed by an Assistant Director, and has counsel available to it to provide legal advice and assistance. All six areas report to my Director of Investigations, who, under the guidance of my Executive Director, ensures that the teams are working smoothly, and that a consistent approach is taken to investigations in all areas.

I have been very pleased with the results of this reorganization. I believe it has resulted in speedier and more effective case handling, higher staff morale, and generally improved service to the public.

Ombudsman Investigators' Workshop

On March 13th and 14th, 1986 our Office hosted the Canadian Ombudsman Investigators Workshop. Thirteen investigators attended from most provinces having Ombudsman as well as representatives of the Federal Privacy Commissioner's Office and the Office of the Public Complaints Commissioner. This was a productive workshop in which issues of general interest to all Ombudsman investigators were discussed. The conference, at very little cost, succeeded in providing a forum for investigators to exchange information, techniques, and points of view on problems common to all Ombudsman offices.

It is hoped that this will be the start of a regular Workshop program to be hosted by a different Ombudsman each year.

SPECIAL PROJECTS INVOLVING SYSTEMIC PROBLEMS

The Workers' Compensation Board and Psychotraumatic Entitlement

Over the last few years, a number of objections to Workers' Compensation Board decisions have involved the issue of entitlement for psychotraumatic disability. In discussions with investigators dealing with these cases, and in reviewing the files, it became apparent that several difficulties keep recurring. For example, although the Workers' Compensation Board might accept that a worker has a psychological disability, entitlement may be denied on the basis of "personality factors" even though there is no prior history of emotional difficulty and the worker has a steady job record. In other cases, denial of psychotraumatic disability entitlement reflects the broader problem of the Board's preferring the opinions of its own physicians over those of treating physicians, regardless of their qualifications.

It is my view that the Board practices on adjudication of psychotraumatic disability entitlement constitute a systemic problem which will not be affected by the changes in the *Workers' Compensation Act* or by the functioning of the new Workers' Compensation Appeals Tribunal. Accordingly, I have directed one of my investigative staff to begin a special study of all our files containing objections to decisions about psychotraumatic disability entitlement.

Consultation will be sought with Board personnel who have a particular interest in the matter of psychotraumatic disability entitlement.

It is my expectation that potential solutions to the systemic problem can be identified, and it is my hope that our findings will lead to improvement in the adjudicative process of claims in which psychotraumatic disability is a factor.

Services for the Developmentally Handicapped in Ontario

Over the past year I have been made increasingly aware of ongoing concerns about the care, treatment and availability of services for the developmentally handicapped. Presentations and/or complaints have been forwarded to my Office by residents of provincially run facilities, relatives of the developmentally handicapped, private organizations and service providers involved in this area.

I became aware that there were recurring themes in the concerns being identified by these diverse parties. Questions about administrative fairness procedures, the legislation governing the developmentally handicapped, funding policies and practices, discharge planning for individuals to be repatriated from provincially run facilities, are but some of the systemic issues brought to my attention.

To ensure that my Office can provide the attention which I believe these representations warrant, I have decided to delegate one of my senior investigative staff as a Special Projects Officer specializing in the area of developmental handicap. The Officer will look into the issue of systemic problems and also provide an expertise in the investigation of specific complaints.

Rent-Geared-To-Income Housing in Moosonee

In response to a proportionately large number of complaints from tenants and applicants in the Moosonee area, I have started a special project to investigate the Timmins Housing Authority's administration of rent-geared-to-income housing in Moosonee. The population of Moosonee is 85% Native people, and their concerns are of particular interest to me.

The investigation will examine a number of issues including: the reasonableness of the Housing Authority's actions in the areas of administration; recommendations to the Ontario Housing Corporation on the need for and provision of additional housing, eviction procedures, provision of appliances, assessment of applicant suitability, and whether applicants are informed of their right to appeal certain Housing Authority decisions.

The investigation has been planned in two major stages. The first, which has been completed, consisted of a site visit to Moosonee and interviews with tenants and other members of the community. The second stage will consist of a review of the Housing Authority's files in Timmins.

The Minister and the Chairman of the Ontario Housing Corporation have expressed their interest in this study and offered their full cooperation to my staff.

Once the results of the investigation are completed and, recommendations are made to me, before proceeding, I intend to discuss the results with both the Minister and the Chairman in hopes of rectifying and jointly resolving any problems uncovered.

Institutional Investigations

As Ombudsman, I have a strong commitment to ensure that those confined in provincial government institutions have the same access to my Office as do other citizens.

Over the past year I have visited seven provincial institutions and certain observations and impressions have been left with me. First and foremost, I am impressed with the professionalism and compassion shown by the staff of these institutions towards those persons in their care. I am cognizant of the very stressful conditions under which staff must work, and the limitations on resources which exist. Nonetheless, I have some concerns based on my personal observations, and they are reflected in the kinds of complaints received by my Office.

I am extremely concerned about the so-called "split" jurisdiction as it applies to young offenders. In Ontario, young offenders, ages 12 to 15, come under the jurisdiction of the Ministry of Community & Social Services, while those ages 16 and 17 are under the jurisdiction of the Ministry of Correctional Services. While both Ministries had to make adjustments, the most significant impact has been on the Ministry of Correctional Services.

The Ministry has had to create "separate and apart" facilities for secure detention and custody of young offenders within many of its existing adult institutions. In addition, the number of young offenders over age 16 seems to be on the increase, as compared to the number of young offenders under the age of 16 who are committed to secure detention and custody. Therefore, many Ministry of Correctional Services Young Offenders Units are routinely overcrowded, while the majority of Ministry of Community & Social Services facilities have yet to reach their full capacity.

The impact of the dislocation caused by the implementation of the *Young Offenders Act* is unmistakable. I am becoming increasingly concerned about the apparent disparity in services available to young offenders based on an artificial age division which has no legal basis. As well, I am concerned that programs and services previously available to adult inmates within the Ministry of Correctional Services have, of necessity, been curtailed because the more stringent legal requirements of the *Young Offenders Act* have caused resources to be diverted for that purpose.

While I am aware that the past twenty years has seen a dramatic and continuous improvement in facilities and programs for adult inmates in this province, I remain concerned about the disparity in programs, services and basic living conditions for inmates among various institutions within the provincial correctional system.

I was particularly disturbed during my visit to the Barrie Jail to see inmates still being housed in cells that have been unchanged since the 1840's. Despite attempts by the Ministry to modernize the institution, the physical limitations of the original structure have proven insurmountable. I find it repugnant that in the 1980's in Ontario, we are still housing inmates in cells that are seven feet deep, thirty-two inches wide and seven feet high, have no running water, toilet facilities or interior lighting. While I do not advocate more prison construction, the Government must consider making monies available to replace outdated and inadequate facilities to ensure that all inmates receive a comparable standard of humane treatment while incarcerated.

I intend to address these issues in more detail in subsequent reports.

UNRESOLVED ISSUES

SOCIAL BENEFITS

Health

In response to a complaint from an advocacy organization representing elderly patients in nursing homes, I am completing an extensive investigation of the actions of the Ministry of Health in carrying out its responsibilities to ensure the good health, care and safety of the residents of a particular nursing home. I have issued tentative conclusions and recommendations expressing serious concern with regard to a variety of health care issues raised in this case such as: possible delays in laying charges against the nursing home; failure to revoke the home's licence and invoke the *Health Facility Special Orders Act* to protect the residents; failure to take action to ensure the existence of a restorative nursing care programme and failure to operate an effective inspection procedure.

At the time of publication of this report, representations from the Ministry of Health on my tentative conclusions and recommendations had just been received. I intend to make my final conclusions as soon as possible.

Amendments to the Family Benefits Act

In the Ombudsman's Fourth Annual Report (October, 1977 - March, 1978), he expressed his opinion that the *Family Benefits Act* ought to be amended to enable the Social Assistance Review Board to vary its decisions in any case where it is in agreement with a report and recommendation of the Ombudsman without insisting on receiving an application for reconsideration from a party and without the necessity of holding another hearing.

In its Fifth Report the Select Committee supported this amendment. In its Seventh Report, the Committee expressed its opinion on the adequacy of the Ministry's response which was to accept the recommendation of the proposed amendment.

The issue appears to have been lost at that point (1979) and has not been raised since. I have recently brought this to the Minister's attention and am awaiting his response.

JUSTICE

Re Ombudsman and the Ontario Labour Relations Board

In my last Annual Report I reported that the Ontario Divisional Court had supported the Ombudsman's position in its case against the Ontario Labour Relations Board, ruling that the Ombudsman had the authority to investigate the merits of quasi-judicial decisions. On March 17th, 1986, the Labour Relations Board succeeded in obtaining leave from the Ontario Court of Appeal to appeal this decision.

When the matter is heard by the Court of Appeal, I am hopeful this issue will be resolved once and for all. In the meantime, a number of Labour Relations Board cases are sitting in abeyance awaiting the decision of the Court of Appeal.

This is a very important issue for the Ombudsman, since approximately 25% of our jurisdictional investigations involve decisions of quasi-judicial tribunals, such as: the Workers' Compensation Board, the Ontario Municipal Board, and the Commercial Registration Appeal Tribunal.

Financial Institutions

The results of investigations into two serious complaints, although completed to the point of seeking representations from affected parties, are still unresolved. These are the Argosy and C & M Financial Consultants Ltd.

244 Argosy complainants and 25 C & M complainants approached the Ombudsman after losing their savings through the alleged maladministration of certain agencies of what is now the Ministry of Financial Institutions.

At the end of 1985, on the basis of the investigations conducted, I sent interim reports pursuant to section 19(3) of the *Ombudsman Act* to the Ministry and the Ontario Securities Commission and invited their representations. Despite attempts at negotiation, only the Ontario Securities Commission has responded with representations. These deal with some of the issues raised by the two cases; the remainder are still not addressed.

If the Ministry's response is not forthcoming shortly, it is my intention to issue a final report without it.

Public Trustee

It is with regret that I must comment in this report on the uncooperativeness of the Public Trustee.

The Public Trustee performs many important functions in the overall administration of justice in the Province of Ontario. Among his responsibilities are the administration of a number of intestate estates and the managing of affairs of persons determined to be incompetent under the *Mental Health Act*.

My concern at this time is not with the merits of the complaints made against the Public Trustee, but with the uncooperative attitude towards the Office of the Ombudsman of Ontario.

This lack of cooperation may be premised in part on the differences in the interpretation and application of our respective governing legislation. However, I have attempted on several occasions to establish a more effective method of working out any differences. Unfortunately, I have met with little success. Those members of my investigative staff who must deal with the Public Trustee find it difficult to effectively and efficiently perform their responsibilities.

Unfortunately, because of these problems, over the past year approximately 20 cases have been held in abeyance at one stage or another in our investigations.

After two years of dealing with the Public Trustee in this way I can no longer in good conscience allow it to continue without publicly stating that this problem exists. I fervently believe that with good faith and mutual respect a working relationship can be achieved.

However, as in the past, where problems cannot be resolved through negotiation with a Ministry agency, I may be forced to take the matter to the Courts for a resolution.

WORKERS' COMPENSATION BOARD SYSTEMIC PROBLEMS

Last year in the Annual Report, I detailed three systemic problems, relating to the Workers' Compensation Board; namely, not availing itself of legal advice or current case law, assessments of permanent disability awards and precedence given to opinions of Board medical staff over outside medical specialists or experts.

Credit should be given to Dr. Robert Elgie for his assistance in attempting to resolve these matters. However, the problem of medical weighting on the side of the Board's medical staff continues, although I am hopeful that, in the near future, reports from treating physicians and outside specialists will be given their due weight.

SPECIAL REPORTS

During the past fiscal year I presented two Special Reports to the Speaker of the Legislative Assembly, involving governmental organizations that refused to implement my recommendations. Although Ombudsman Reports are generally presented annually to the Assembly, it is my practice, in matters of special urgency, to issue Special Reports to the Speaker so that the Standing Committee on the Ombudsman can consider them on a priority basis.

The two reports presented dealt with matters needing resolution before September, 1986, the usual time for the Committee to deal with the Ombudsman's Annual Report.

One concerned my recommendation that the Ontario Northland Transportation Commission accept the request of a long-standing employee to buy back pension entitlement for early service with the Commission. As the complainant was to retire soon, his request had to be dealt with expeditiously.

The other report dealt with my recommendation that the Ministry of Health allow a complainant to transfer OHIP billing privileges to a facility for which he has an option to purchase the licence. The complainant's option to purchase expires this June.

Within a week of the tabling of these Special Reports, the Standing Committee was able to consider both and, I am pleased to report, supported my recommendations.

In the future I will continue to use the vehicle of Special Reports when necessary to obtain a speedier resolution of complaints and to ensure that a delay in justice does not result in a denial of justice.

FINANCIAL COMPENSATION FOR COMPLAINANTS

On many occasions I have been asked how much financial compensation from governmental organizations is achieved by this Office on behalf of our complainants. Although I do not believe that the amount of monies acquired for complainants should be used as an index to measure the effectiveness of this Office, I do believe there may be some merit in reporting such information.

Since I have not monitored running totals of compensation in each policy area, in this report I can only approximate totals. However, in my subsequent reports I will provide more detailed figures.

During the last fiscal year more than \$500,000 (approximate figure) was acquired for our complainants. Of this amount \$465,000 came from the Workers' Compensation Board alone, the highest single award being \$79,000. Other amounts vary from \$5 on an overpayment of a parking ticket to \$22,000 for a compassionate allowance to an institutionalized inmate for personal injury suffered in the institution's shop.

THE CANADIAN OMBUDSMAN COMMITTEE ON CHILD PROTECTION

In June, 1985 the Canadian Conference of Legislative Ombudsmen was held in Quebec City hosted by my Quebec colleague, Mr. Yves Labonte, le Protecteur du Citoyen. Ombudsmen and staff from every province (except Prince Edward Island) participated in this excellent and productive gathering.

Two important resolutions were adopted: the first called for the creation of a Federal Ombudsman; the second recognized the increase of recorded incidents of child abuse and neglect. All provincial Ombudsmen agreed to seek solutions which would protect one of society's most vulnerable groups. To give effect to this resolution, a Committee was appointed consisting of Mr. Brian Sawyer, Ombudsman of Alberta, Mr. David Tickell, Ombudsman of Saskatchewan and myself. To date the Committee has drafted a "Declaration of Principles on the Handling of Children's Complaints" which has now been circulated to all Ombudsman Offices in Canada, for comment at the Annual Meeting of Canadian Ombudsmen in June, 1986. In addition a national clearing house for information pertaining to child protection is now located in the Ontario Ombudsman's Office.

CASE SUMMARIES

SOCIAL BENEFITS

One of the Ombudsman's powers is the right to "investigate the investigation" of another governmental agency. In the following case, the Ombudsman was not satisfied with the basis on which a decision had been made.

Summary No. 1

The father of a handicapped child complained to the Ontario Human Rights Commission that the Board of Education in his area indulged in discriminatory practices in its provision of bus service to handicapped students. He alleged that the services provided under the authority of the Board were substandard to those provided to non-handicapped students. He also alleged that driver training, licensing, expertise and attitude as well as vehicle maintenance and safety features were inferior for handicapped students. His complaint to the Commission was dismissed and a reconsideration submission was unsuccessful in having the Commission change its original decision. The Commission's decision was based on the finding that the Board had made reasonable efforts to improve bus safety and bus service to handicapped students and had long-term plans for improving service over the next few years.

The complainant was dissatisfied with the Commission's reasoning that the Board had made reasonable efforts to accommodate the needs of his child. The complainant contended that there was no evidence of any long-term plan to improve the bus service, that concessions made to him did not adequately address the magnitude of the issues raised, and that the Commission's investigation did not extend to an examination of the extent to which the private company contracted by the Board to transport handicapped children had violated minimum safety standards and contractual arrangements. He felt that the Commission had disregarded evidence illustrating the inequality between transportation services for handicapped and non-handicapped students, and was deterred by the Board's calculation which demonstrated that there would be a substantial increase in cost if the buses and drivers for handicapped students were brought up to the standard of the Board's buses.

During our investigation, we examined the extent to which the Commission inquired into discrepancies between the services, the reasons

for the Board's choice of service for handicapped students, as well as the Board's assurances of current and future improvements in the transportation service of its handicapped students. This was done with a view to determining the reasonableness of the Commission's decision and the adequacy of the investigation upon which its decision was based.

The Ombudsman tentatively concluded that the decision of the Commission not to request the Minister of Labour to appoint a Board of Inquiry to hear the complaint was unreasonable, based upon an inadequate investigation. In particular, the Ombudsman noted that the complainant had consistently maintained that there was no ongoing plan to improve services and our investigation had revealed no concrete evidence of any plan by the school Board to further improve upon the 1983/84 contractual arrangements, nor were there specific plans to attempt to equalize the service over some projected period. The Ombudsman's tentative recommendation was that the Commission should request the Minister of Labour to appoint a Board of Inquiry.

The complaint was resolved when the Commission agreed that its investigation of the complaint was inadequate and agreed to carry out further investigation in order to arrive at an informed decision when it considers whether it should request the Ministry of Labour to appoint a Board of Inquiry under section 35 of the *Human Rights Code*.

The Ombudsman maintains that the requirements of natural justice must be met before a valid decision seriously affecting a person's future can be made.

Summary No. 2

When this nursing student at a community college was dismissed from the nursing program just seven days before her expected graduation, she appealed the dismissal. At the hearing, she found that the lawyer she had chosen to assist her was not allowed to make representations on her behalf. Afterwards she received a letter advising her that the appeal had been denied, but she was given no reasons for the denial.

The College informed us that Appeal Committee members thought it advisable that they hear appeals directly from the persons involved. It was therefore the policy of the College that each student should make his or her own representations at a hearing. The College also explained that it had been its policy not to provide reasons for decisions of the Committee.

It appeared to the Ombudsman that it was unjust not to allow students whose professional careers might be at stake to have a representative to fully present their cases at hearings. He also thought that students should have the right to request written reasons for decisions of the Committee.

As a result of the Ombudsman's submissions, the College agreed to revise its procedures so that, following a majority decision on a grade appeal, a written summary of the reasons for the decision will be prepared, and this summary will be available to the affected student upon request. The College also agreed to review its procedures to allow representatives to act on behalf of students in appropriate circumstances, for example when a professional career may be at stake.

Indigent persons in the care of provincial psychiatric institutions were treated differently from those in psychiatric wards of public hospitals. The Ombudsman asked, "Why?"

Summary No. 3

When this complainant was a patient in the psychiatric ward of a public hospital, she received a "comfort allowance" under the *Family Benefits Act* of \$61 per month. She used this money for minor expenses, such as stationary, stamps, craft supplies, books, toiletries, make-up and cigarettes. But when she was transferred to a provincial psychiatric institution, she discovered that her comfort allowance had been cancelled. She argued that since she incurred the same minor expenses as when she was hospitalized, she still required the comfort allowance.

From our inquiries we established that in accordance with Family Benefits legislation, comfort allowances are not paid to patients in institutions operating under the *Mental Hospitals Act*. Patients in psychiatric hospitals are not considered by the Ministry to be persons in need because these hospitals have established internal mechanisms to provide patients with all necessary care, comfort, and clothing.

But the Ombudsman looked at the matter from a different perspective: it appeared to him that the hospitals had established these programs *because* some patients are persons in need.

Our research indicated that psychiatric hospitals have found it necessary to establish a variety of programs to provide "comforts" to patients, both in cash and in kind. The funds come from various sectors of each hospital's own budget, and from volunteer organizations and fund raising activities. Our research appeared to confirm that indigent patients have needs which are not fulfilled by the provincial psychiatric hospitals.

The Ombudsman wanted to ensure that indigent patients in provincial psychiatric hospitals receive a comfort allowance. He wrote the Ministry of Community and Social Services recommending that the relevant provisions of the *Family Benefits Act* be reconsidered so that indigent patients would receive a comfort allowance.

The Ministry advised the Ombudsman that the matter of comfort allowances had been made the subject of an inter-ministerial review. The Ministry of Health and the Ministry of Community and Social Services had jointly completed a draft report, and further study of the operational and financial implications of the options presented in the draft report was underway.

The Ministry promised to keep our Office advised of its progress and stated that its findings regarding comfort allowances would be given to us as soon as it had decided upon a course of action.

The Ombudsman was satisfied at that time that the problems faced by indigent patients would be resolved following completion of the inter-ministerial review and the implementation of new procedures. He will, however, review the proposed changes to ensure that his concerns are met.

The Ombudsman is a proven method for cutting red tape. A prompt inquiry from the Ombudsman may bring quick results.

Summary No. 4

The complainant is a disabled person suffering from cerebral palsy and receiving a disability pension from COMSOC. Unfortunately, the complainant lost his cheque just before his wedding and, as it was endorsed, contacted the Ministry to advise of the loss and request a replacement cheque. The complainant was advised by the Ministry that the cheque could not be stopped, and since it was endorsed, the money was lost with no hope of recovery or reissue. It was the

complainant's opinion that the Ministry's position was unfair as the cheque was lost through no fault of his own and he had immediately advised the Ministry of the loss.

Informal inquiries with the Ministry clarified the Ministry's policy and a stop-payment was placed on the original cheque. The complainant received a replacement cheque the same day.

The speed with which a Ministry process is implemented may sometimes be crucial. The two following cases illustrate the Ombudsman's assistance in ensuring that prompt implementation occurs.

Summary No. 5

The complainant contacted our Office with a complaint against the Ministry of Skills Development. Apparently, he took courses and did an apprenticeship to obtain a mechanic's licence and, in October 1985, was told that he passed his exam. In December, he was informed that he would not get a licence as he did not have enough course hours. He brought in the missing documentation and was told that it would take another six weeks for his licence to be issued. The complainant contended that this delay was unreasonable; he could not secure employment without a licence. He maintained that the Ministry should have confirmed his course hours in October.

Informal inquiries were made to the Ministry to determine when the licence would be issued and whether its processing could be expedited. The licence documents were processed immediately and the licence was available that afternoon.

Summary No. 6

The complainant's son was a student attending a post-secondary school out of the province. He was awaiting financial assistance from the Ontario Student Assistance Program at the Ministry of Colleges and Universities. The complainant informed our Office that her son had submitted his application in September. It was now the beginning of January and his mother maintained that the delay in issuing his money was causing financial hardship. She had been informed by someone at the Ministry that his award would be issued in several weeks.

Informal inquiries were made to the Ministry of Colleges and Universities to determine what was causing the delay and when the student would receive his award.

Ministry officials searched for the student's application and learned that the delay was due to a clerical error on the Ministry's part. The student's application was consequently given priority; he received his award shortly thereafter.

When any decision affects a citizen's well-being, the Ombudsman is of the opinion that adequate reasons for the decision must be provided.

Summary No. 7

The complainant was unemployed and receiving Welfare assistance while pursuing a job search. His Welfare was subsequently cancelled because his job search reports were not considered adequate. He appealed the decision to the Social Assistance Review Board and applied for interim assistance. The Review Board granted that he receive one month's interim assistance.

During our investigation it came to our attention that the complainant was not provided with an adequate explanation as to why only one month of interim assistance was granted. The Chairperson of the Review Board was notified of the Ombudsman's tentative recommendation that an explanation of the Review Board's actions ought to have been provided to the appellant. The Chairperson agreed with the Ombudsman's position advising that, in cases of interim assistance, the Review Board would undertake to provide the appellant with an explanation and/or the reasons for the decision to grant or refuse interim assistance.

Sometimes a complainant may not be aware of what information has been considered in a decision-making process. The Ombudsman may assist citizens by clarifying the basis upon which a decision was made.

Summary No. 8

The complainant submitted medical evidence to the Ministry of Community and Social Services in support of her application for Family Benefits as a permanently unemployable and disabled person; however, she was denied assistance by the Director of Income Maintenance.

The complainant unsuccessfully appealed the Director's decision to the Social Assistance Review Board. In the course of reviewing these decisions, we noted that although the complainant had seen a number of specialists about her medical condition, their reports had not been submitted to the Ministry or the Review Board for consideration. The complainant was advised of this and was satisfied that the information clarified her concerns.

Special circumstances may occasionally justify waiving the usual rules.

Summary No. 9

The complainant wrote to this Office from a temporary address in Switzerland with concerns regarding a decision of OHIP's special committee to terminate coverage due to absence from Ontario. According to OHIP, the complainant failed to meet residency requirements for continued eligibility and his OHIP agreement was cancelled effective October 1, 1985. It was the complainant's opinion that his absence from Ontario was a result of being required to testify at hearings regarding Nazi war crimes and that OHIP's decision failed to consider continued eligibility on compassionate grounds.

Following informal inquiries by this Office on his behalf, OHIP agreed to waive the residency requirements in recognition of his special circumstances. Consequently our complainant's policy was reinstated to cover the period of October 1, 1985 to January 1986, even though he was out of the country for an indefinite period of time.

LAND USE, RESOURCES AND REVENUE

A Cree-speaking couple were evicted by the Housing Authority after they signed an agreement written in English which they could not understand. The Ombudsman's investigation resulted in obtaining not only suitable housing for the couple, but also an agreement that the Housing Authority would change its procedures.

Summary No. 10

This couple felt that the local Housing Authority had unfairly evicted them from their rent-geared-to-income apartment in a northern town.

The investigation indicated that they had been warned that disturbances in their apartment had caused other tenants to complain and if this did not cease, their tenancy would be terminated. Subsequently, the husband signed an "Agreement to Terminate a Tenancy". About two weeks later, an official of the Housing Authority informed the complainant that the apartment had been rented to someone else and inquired when he was moving. The complainants subsequently moved, with the husband going to live in an apparently uninsulated building with no electricity, running water, central heating or plumbing. His wife was not well enough to live in such accommodation and went to the hospital.

Both the husband and wife speak and read only Cree. The husband indicated that he had not understood the meaning of the agreement which he signed, but assumed that if the Housing Authority told him to move, he had no choice but to do so.

In June 1985, the Ombudsman wrote to the Chairman of the Housing Authority setting out his tentative support of this complaint. The Ombudsman felt that the Housing Authority had acted oppressively in presenting to the complainant an agreement to terminate a tenancy in English which he could not read and leading him to believe that he had no recourse but to sign it and vacate the apartment. The Ombudsman recommended that the Housing Authority alter its practice so that tenants are evicted in accordance with the *Landlord and Tenant Act* so as to have their right to dispute an eviction in court, that the Housing Authority cease using the form "Agreement to Terminate a Tenancy" unless approached by a tenant with an explicit desire to so terminate a tenancy, and that the complainants be housed according to their need. In response, the Housing Authority stated that the complainant had well understood the form and the couple could not be reassessed for subsidized housing because they had forfeited their eligibility by refusing to allow other tenants their basic right to quiet enjoyment of the premises.

The Ombudsman decided at that point to conduct further investigation by having a member of his staff who speaks Cree interview the complainant once again about the signing of the agreement. This additional investigation confirmed that the complainant felt that he had no choice but to sign the paper and move.

The investigation indicated that the Housing Authority had presented to the complainant a document written in a language which it knew he did not understand, failed to offer him a choice as to whether to sign it, and did not explain the consequences of signing. The Ombudsman felt that the complainant was thereby denied the right to dispute what in essence was an eviction, but an eviction carried out without following the procedures set out in the *Landlord and Tenant Act*.

In December 1985, the Ombudsman sent to the Housing Authority and to the Minister of Housing his final report recommending that the complainants be rehoused, that the Housing Authority issue notices of termination in accordance with the law when it wishes to evict tenants and that it cease the use of the "Agreement to Terminate a Tenancy" except where it has been fully explained to the tenant that he or she is under no obligation to sign.

As a result of the report, the Ombudsman met with the Chairman of the Housing Authority and the Assistant Housing Manager who indicated that they were prepared to house the complainant in a family unit along with his grandson and his family. In the circumstances, the Ombudsman considered the complaint to have been resolved. Also, as a result of this complaint, the Housing Authority is now following the *Landlord and Tenant Act* where it wishes to evict tenants so that they are not deprived of their legal rights to dispute the eviction.

Our complainant felt that the Minister of the Environment had circumvented the provisions of the Environmental Assessment Act through an Order-in-Council. While the Ombudsman did not obtain the remedy the complainant sought, he recommended that in future assessments should be carried out to ensure public confidence.

Summary No. 11

The complainant resided near the site of a proposed subway station. She was concerned about the environmental impact of the station and the associated development it would attract to the area.

Construction of a new subway station is subject to the *Environmental Assessment Act*, an Act established to prevent environmental damage and to permit public participation in the environmental decision making process. In this case, the proponent of the project requested the Minister of the Environment to recommend to Cabinet that the project be granted an Order-in-Council exempting the project from application of the Act.

Although the Minister had referred the proponent's request to the Environmental Assessment Advisory Board, the Minister did not accept the advice of the Board to deny the request. The Minister instead recommended to Cabinet that it grant the exemption request. After Cabinet approved the Order-in-Council, the complainant requested the Minister to recommend revocation of the Order, but the Minister denied her request.

The complainant contended that the Minister's decisions were unreasonable. She felt the environmental impact of the station and the associated development ought to be considered through the environmental assessment process.

It was the Minister's position that the proponent of the project could suffer undue expense and delay in obtaining approval under the *Environmental Assessment Act* for an undertaking which he considered would have minor direct adverse environmental impacts. Having weighed this "injury" against the betterment of the people of Ontario by the protection, conservation and wise management of the environment which would result from the undertaking, it was his opinion that it was in the public interest to order that the undertaking be exempted. The Minister submitted the following specific reasons for his decision: the construction of the station would have minimum adverse impact on the environment; completion of the station would provide a needed transportation facility; provision of the station had been facilitated by the earlier construction of truck grades to accommodate the station; the proponent of the project and the City where the station was to be located had provided the public with information and had held meetings soliciting public input regarding the station; and the proponent had submitted a report to show how the environment was likely to be impacted and setting out mitigating measures.

The Ombudsman concluded that the Minister's decisions were unreasonable. He felt the residents in the area would be significantly affected by the development which would follow the construction of the station. He concluded that the indirect effects of the station, i.e. the development as contemplated by the defenders of the "environment" in the area, should have been addressed through the Environmental Assessment process. The Ombudsman concluded that the complainant and other residents of the area had not been afforded the environmental assessment of the station and the proposed development or the input into the environment decision-making process which they should have been given under the Act. Since all necessary approvals were in place to allow the proponent to proceed with the construction of the station and the associated development was underway, the Ombudsman felt that it would be inappropriate for the Minister to recommend revocation of the exemption order. He nevertheless expressed his hope that in the future, given similar circumstances as set out in this complaint, any Minister of the Environment would not overlook the impact of the *Environmental Assessment Act* in addressing the concerns of the public.

In some circumstances, taxing laws may result in unfair double taxation. In this case, the Ombudsman was able to rectify the inequity.

Summary No. 12

In August of 1982, while in Ontario for a vacation, the claimant purchased a new vehicle, paying \$477.05 in retail sales tax. She then returned to her home in British Columbia, leaving the vehicle stored in Ontario. Three months later, it was driven to British Columbia, where that province levied \$360 in retail sales tax on it. Some nine months later, the claimant returned to Ontario where she has resided since and used the vehicle.

While the law in Ontario required that retail sales tax be paid on the vehicle at the time of its purchase, it also provided that tax might be refunded by the Minister of Revenue if the item was removed from Ontario within 30 days of its sale for the purpose of being used permanently outside Ontario. In this case, however, the vehicle remained in Ontario for three months after its purchase. The Minister of Revenue may exempt a

purchaser from the payment of tax if, owing to special circumstances, it is inequitable that the whole amount of tax be paid. The Ombudsman noted that the vehicle was not used in Ontario except to drive it out of the province. Also, the claimant did not intend to use it in Ontario at the time of purchase since she was not living here then and left the province very soon after purchasing it. The Ombudsman felt that the complainant might have been unjustly taxed twice on the vehicle and the Minister would therefore have the power to exempt her from the tax paid to Ontario.

In February of 1985, the Ombudsman wrote to the Deputy Minister of Revenue tentatively recommending a refund of the tax. The Ministry was not prepared at that time to grant a refund, but agreed to ask its counterpart in B.C. if it would refund the tax paid there. After that request was refused, the Ombudsman and Ministry staff met to discuss the case. In November of 1985, the claimant received a cheque from the Ministry of Revenue refunding to her \$477.05 in retail sales tax.

A long-standing concern of one of Ontario's native citizens was resolved through the Ombudsman's assistance.

Summary No. 13

In 1945 this Native Canadian complainant moved his family from the Reserve to his job at a commercial fishery in northern Ontario. When he bought the business with a Federal government loan in 1952, he assumed he had also purchased the Crown land on which the log cottage and fishery buildings stood. He raised thirteen children there and regarded it as his home.

When he discovered in 1969 that he did not hold title to the land, he applied to the Ministry of Natural Resources to purchase a two-acre parcel. However, he did not follow through on the Ministry's offer to sell at appraised market value, possibly because his eldest son was not then available to assist his father. In 1971, the complainant and his family moved back to the Reserve as he could no longer earn a living due to mercury contamination of the lake.

When the complainant again approached the Ministry of Natural Resources in 1973 to purchase the cottage and two acres of land for recreational use, he was told that Ministerial policy dictated that no further Crown land would

be available for sale. However, the Ministry could offer him either a ten-year lease or a land use permit under its remote cottage policy. This was not acceptable to the complainant and in 1975 he and his eldest son attempted to establish that he had title to the land by applying for Quit Claim Letters Patent. The application was denied.

In 1982, the complainant requested the assistance of the Ombudsman. We notified the Ministry of the Ombudsman's intention to investigate the complaint that the Ministry had acted unreasonably when it denied his Quit Claim application. We also requested that the Ministry postpone its April 30, 1982 deadline, by which time the complainant had to make arrangements for a Crown lease or land use permit, failing which the fishery buildings and log cottage would be dismantled. Members of the Ombudsman's legal staff researched the complainant's previous Quit Claim application and the Ombudsman's representatives met with both the complainant and his son, and with Ministry officials. The Ministry agreed to postpone the deadline.

Our investigation revealed that various supporting documentation which had been supplied with the application had not reached the Ministry and we were also able to help the complainant obtain other affidavits from elderly people who had lived in the area many years ago. The Ministry agreed to review the complainant's new application for Quit Claim Letters Patent in the context of the recently submitted supporting documentation.

The application was again denied, as the Ministry had discovered a 1951 application to purchase Crown lands made by the complainant's former employer, which indicated the complainant had not had title for sixty years. The Ministry's position was that the application had been denied because adverse possession could only be proved for .77 acres for the period 1951 to 1983. The Ministry offered to sell 1.47 acres of land at an \$8,000 appraised market value. The complainant contended that, in view of his long occupancy of the land and the long history of his occupation of the cottage, a fair price would be based upon the 1969 market value, the year in which he first applied to the Ministry to purchase.

As a result of our Office's involvement, the Ministry requested the complainant make a submission indicating what he thought would be a fair purchase price. Eventually, the Ministry accepted the complainant's offer of \$2,500 for 1.47 acres.

JUSTICE, LICENSING AND LABOUR

The Ombudsman may be able to provide further information to a governmental organization to assist in the resolution of a complaint.

Summary No. 14

The investigation of this case focused on the efforts of the Employment Standards Branch to recover \$182 in wages which had not been paid to the complainant by his former employer. The Employment Standards Branch had looked into the matter and had ordered the employer to pay. No money was recovered because the employer's restaurant had become insolvent and the Branch advised the complainant that it could do nothing further to recover his money.

During the investigation, it was discovered the restaurant had not in fact failed until one year after the Branch ordered the employer to pay the wages. In addition, at the time the order was made, the Branch could have made a third party demand on the personal assets of the owner of the business because it was a sole proprietorship. The Branch had been under the impression that the business was a corporation rather than a sole proprietorship and that assets therefore could not be seized.

The Ombudsman wrote informally to the Deputy Minister of Labour noting that some five years had passed since the complainant had left this job and that the Branch had been acting under a misapprehension as to the nature of the business. He suggested that the \$182 in wages ought to be paid and, about one month later, the Deputy Minister of Labour indicated his agreement with the settlement. The complainant duly received his wages.

Sometimes the Ombudsman's investigation of an individual complaint can prompt a review of all complaints received against a particular governmental organization.

Summary No. 15

At the time this complainant entered a psychiatric hospital, he voluntarily appointed the Public Trustee as committee of his estate. Five months later, at the complainant's request, the committee was terminated.

As part of his management of the complainant's estate, the Public Trustee had notified various organizations, including the Post Office, that until further notice the complainant's correspondence should be redirected to the Office of the Public Trustee. But when the committee ship was terminated, the Public Trustee did not notify the Post Office until five months later that the complainant's mail should not be redirected to his office. Because the complainant's home had been sold, this meant that all mail addressed to his former address continued to be forwarded to the Office of the Public Trustee.

The mail redirected to the Public Trustee was opened in the mail room. Cheques were cashed and deposited in the Public Trustee's account. In one case the complainant's money was not forwarded to the complainant until three months later. In another case the Public Trustee accepted and opened a registered letter to the complainant offering him employment. The letter was not forwarded to the complainant until long after the last day he could have accepted the position. It was fortunate in this latter instance that the complainant had not expected the job offer, because the delay might have had serious ramifications if his livelihood had been dependent on the offer.

When the complainant contacted the Post Office four months after the end of the committee ship to inquire why mail addressed to his former residence was not being forwarded to him, he discovered that the court order directing that his mail go to the Public Trustee was still in effect. After some further delay, the Public Trustee notified the Post Office that he had ceased to act on behalf of the complainant.

The Ombudsman's investigation centred on the handling by the Public Trustee of mail sent to patients for whom he is no longer responsible. He recommended to the Public Trustee that, at the end of every trusteeship, he notify the Post Office and other sources of correspondence of its termination as soon as possible. He also recommended that the Public Trustee implement procedures whereby any mail received in his office after the termination of a committee ship be directed on the same day to the Estates Officer in charge, and that he or she be responsible for redirecting it by the next working day.

The Ombudsman recognized that the complainant had suffered anxiety and humiliation when he was told by bankers, pension fund holders, employers and others that they could not

conduct business with him without the authority of the Public Trustee. With this in mind, he also recommended that the Public Trustee reimburse the complainant 50% of the administration fees charged.

The Public Trustee did not agree to implement the Ombudsman's recommendations. He was of the view that the first recommendation was unnecessary because in all cases the Post Office and other sources are already notified as soon as possible when a committee ship is terminated. He also indicated that, given the volume of work handled by his staff, it would be impractical to ensure that mail addressed to a former patient and received at his office be forwarded by the next working day. Finally, he refused to reduce the administrative charges on the complainant's estate, stating that based on the level of services performed, any allowance would not be justified.

Following the Public Trustee's final response, discussions were held and correspondence exchanged in an attempt to resolve the matter, to no avail. Upon careful consideration, it was the Ombudsman's view that this particular matter should not be pursued further. However, he has instructed his staff to review all of the complaints against the Public Trustee presently under investigation, with a view to assembling a special report presenting any ongoing concerns our investigations have identified with respect to the Public Trustee's process and procedures. That report would include the serious concerns raised by this investigation.

Even if a problem is not strictly within the Ombudsman's jurisdiction, our Office may be able to help.

Summary No. 16

This 66-year-old teacher had contributed to the Teachers' Superannuation Fund for 19 years. Although he continued to teach past his retirement age, he was anxious to retire. But before retiring he wanted to substantially increase his projected retirement income by taking advantage of recent amendments to the *Teachers' Superannuation Act* that would have allowed him to buy additional pension credit for the seven years he had spent before becoming a teacher in a trade related to his teaching.

The problem the complainant faced was that he was already receiving \$33 a month pension from a plan operated by his union during the years he was in private industry. The Teachers' Superannuation Commission agreed that he was eligible to buy the credit, but told him that he could not do so while he was still receiving this pension. His attempts to divest himself of this small pension had proved unsuccessful; both his former employer and the assurance company handling the pension advised him that they were legally unable to terminate his pension benefit.

Although our Office could not directly help the complainant as his complaint was outside the Ombudsman's jurisdiction, we wrote him suggesting possible ways to handle the problem. We suggested he write the assurance company and the Pension Commission of Ontario outlining these suggestions.

After considering these solutions in light of the applicable legislation, the assurance company, the Pension Commission of Ontario and Revenue Canada agreed that by using the suggested solutions the problem could legally be resolved. The complainant was allowed to pay back the pension he had received to that date, and this money was then rolled over to the Teachers' Superannuation Fund. In this way the complainant became eligible to take advantage of the trade credit option and substantially increase his retirement benefits.

INSTITUTIONAL INVESTIGATIONS

The following case illustrates the importance of institutional staff acting as positive role models for those in their care.

Summary No. 17

An inmate at a correctional institution complained to our Office that he had heard a correctional officer make a racial remark about him to another correctional officer.

The incident occurred as the correctional officer was escorting the inmate and four other inmates from the dining room to their unit. As they passed a correctional officer seated on a bench supervising inmates in a gymnasium, the inmate heard the escorting officer make a racial remark about him to the other officer. He immediately turned and questioned the escorting officer, but he was told to keep moving. The inmate complained to officials at the institution, and then to our Office.

Although the correctional officer denied that he had made the racial remark, the other correctional officer to whom the remark had been addressed supported the inmate's allegation. Another inmate, walking beside the complainant at the time of the incident, also stated that he had heard the remark.

The Ombudsman recommended to the Ministry that the correctional officer be disciplined, because his derogatory racial remark had been discourteous and unprofessional. He reminded the Ministry that its Manual of Standards and Procedures emphasizes positive communication between staff and inmates to avoid conflict. He also recommended that the correctional officer be enrolled in the Ministry's Human Rights Training program.

Following our investigation, the Ministry conducted its own investigation of the incident. After a disciplinary meeting, the correctional officer was disciplined. As well, all correctional staff of the institution will, in due course, receive training as part of the Ministry's ongoing Human Rights Training program.

The Ombudsman also recommended that the Ministry revise its Manual of Standards and Procedures to include its "Policy Statement on Human Rights and Race Relations". This policy statement had been issued in 1983, and an announcement implementing the policy had been circulated throughout the Ministry. All managers received a training package providing guidelines for training and educational programs and suggesting procedures for dealing effectively and responsively with human rights issues.

The Ministry agreed to implement the Ombudsman's recommendation and the Manual was revised in August 1985 to include the policy statement. The revised manual also obliges managers to ensure that all reported violations are investigated thoroughly, objectively and without delay. If breaches are found, corrective action is to be taken quickly, fairly, and firmly.

The Ombudsman recognized that the Ministry is committed to creating a climate of understanding wherein every individual is treated with courtesy, respect, and without prejudice or discrimination. He agreed with the Ministry that violations are isolated and do not involve the vast majority of Ministry staff.

The Ombudsman can sometimes act as a catalyst to facilitate communication and cooperation between government organizations, leading to the resolution of a complaint. Involvement in the following case resulted in an agreement being reached between two provincial Corrections Ministries which gave effect to judicial intent in one inmate's case.

Summary No. 18

This inmate in an Ontario correctional institution had earlier escaped custody in British Columbia, and several months of his sentence there remained to be served. The inmate was convinced that the Ontario judge, when sentencing him to twenty-two months in an Ontario institution, had made it clear that the sentence should be served concurrently with the remainder of the inmate's British Columbia sentence. The inmate could not prove this because, after the sentence had been handed down, neither his lawyer nor the Crown had contacted British Columbia correctional authorities to ensure proper arrangements were made to carry out the judge's wishes.

Understandably, the inmate did not want to be sent to a British Columbia institution when his Ontario sentence was completed, particularly since this would result in his serving more time in custody than he believed the Ontario judge intended. Before he contacted our Office, he had spent many months trying to resolve the matter on his own.

The judge confirmed to our Office that he had intended the inmate's Ontario sentence to be served concurrently with the remainder of the British Columbia sentence. But we discovered that satisfying the judge's intention would not be a simple matter: Ontario does not have a formal agreement with British Columbia for an exchange of services, and so there was no mechanism available to permit British Columbia sentences to be served in Ontario. We were also aware that British Columbia authorities had earlier taken the position that the inmate's sentence served in Ontario would not be recognized in British Columbia.

When we advised the Ministry of Correctional Services of the judge's intention, the Ministry agreed to write its British Columbia counterpart and suggest that the two provinces enter into a special exchange of prisoners agreement.

The British Columbia Commissioner of Corrections agreed to this special exchange and the remainder of the inmate's British Columbia sentence was transferred to Ontario to be served concurrently with his Ontario sentence.

The doctrine of administrative fairness is central to the work of the Ombudsman. In this case, our investigation resulted in policy changes guaranteeing representation and the right to know the case against them for Ministry staff who are subject to internal investigation and disciplinary proceedings.

Summary No. 19

As a result of an internal Ministry investigation into two incidents wherein inmates alleged excessive use of force, several correctional staff were dismissed from employment following disciplinary proceedings. The employees complained to the Ombudsman about unjust dismissal and about unreasonable actions of Ministry officials involved in the investigation of the incidents and the subsequent disciplinary proceedings.

Grievances related to the dismissals of three bargaining unit and two non-bargaining unit employees were heard by the Crown Employees Grievance Settlement Board and the Public Service Grievance Board respectively, and in both cases the decision to dismiss was upheld by the Boards. Our investigation of the decision of the Crown Employees Grievance Settlement Board was terminated when the bargaining unit employees sought judicial review of the Board's decision. The investigation of the decision of the Public Service Grievance Board resulted in a finding by the Ombudsman that the Board had not acted unreasonably in upholding the Ministry's decision to dismiss the two employees.

With respect to the employees' complaints against officials of the Ministry of Correctional Services for the manner in which the investigation and subsequent disciplinary proceedings were carried out, the Ombudsman's investigation resulted in a report which substantially supported the employees' complaints and in which the Ombudsman recommended significant policy changes to ensure procedural fairness and representation for staff subject to investigation and disciplinary proceedings.

Commencing with issuance of the Ombudsman's tentative conclusions and recommendations pursuant to section 19(3) of the *Ombudsman's Act*, and continuing after the Ombudsman's report of his findings to the Minister and the Premier, this case was the subject of detailed discussions between senior officials of the Ministry and members of the Ombudsman's senior staff. The Ministry also entered into consultations with the Ontario Public Service Employees Union. As a result of these discussions, the Ministry of Correctional Services agreed to the following:

- That inspectors be instructed on the need to be impartial during the course of their investigations.
- That employees who are interviewed pursuant to section 22 of the *Ministry of Correctional Services Act* be permitted to refresh their memories from notes when such notes are reasonably available and a staff member so requests.
- That in certain situations staff be permitted an agent or lawyer to be present during an interview conducted under section 22.
- That for disciplinary meetings:
 1. the employee should be given notice of the allegations against him or her prior to the meeting;
 2. the employee should be provided with the substance of the evidence against him or her; and
 3. the employee should have an opportunity to be represented at the meeting by a person of his or her choice.

Many concerns of provincial government employees fall outside of the collective bargaining process or other statutory remedies, usually because of the individual's employment status. In this case a former employee was assisted in recovering wages owed to him at the time of his voluntary resignation from the Ministry.

Summary No. 20

When this complainant returned to work at a correctional institution after being on sick leave for almost three weeks, he immediately resigned from the position he had held for three and a half

years. The Superintendent suspected that the complainant had not been sick, but rather had been attending a training session to prepare him for a new position. The Superintendent refused to pay the complainant for the days he had been absent.

Although the complainant had a medical certificate supporting the legitimacy of his absence from work, the Superintendent wanted him to swear before a Justice of the Peace that he had been ill and that he had not commenced work with the company prior to his resignation from the Ministry.

Our Office contacted the complainant's doctor, who advised that the complainant had a chronic condition and was subject to fainting spells. The doctor was concerned that the complainant might injure himself while working because of the presence of potentially dangerous equipment and substances in his work areas in the institution. The doctor verified that he had advised the complainant to remain home during the disputed time as he considered the complainant to be unfit for duty.

In our view, the complainant had a medical certificate substantiating that he had been ill, and we therefore did not consider it appropriate to require him to take an oath. As a result of our intervention with more senior Ministry officials on the complainant's behalf, the complainant was paid the wages due him for the weeks he had been ill.

WORKERS' COMPENSATION BOARD

Misinformation in the Board's file may sometimes prevent compensation being awarded. In this case, the Ombudsman assisted by obtaining correct information so that retroactive benefits could be paid.

Summary No. 21

In 1962 and 1967 this worker sustained back injuries for which he was granted benefits. In July 1979, the worker experienced further back pain and requested either temporary partial benefits or a pension award. The Board denied the worker's request, basing its decision, in part, on medical reports which indicated that in 1959 the worker had been hospitalized for a non-work-related back condition. Furthermore, the information pertaining to the 1959 hospitalization suggested that the worker's symptoms were due to a herniated disc problem which accounted for his 1979 back pain.

During the course of our preliminary investigation, the worker maintained that he was not hospitalized in 1959 for any back problem. Our Office obtained, from three hospitals, information which was submitted to the Board. The information confirmed the worker's statements that he did not have a herniated disc problem in 1959. On the contrary, the information revealed a diagnosis of a herniated disc following the worker's 1967 work injury.

On May 3, 1985, based on the information submitted by our Office, the Board revoked its previous decision and granted the worker retroactive benefits.

The following case is another instance where entitlement was denied as "arising out of and during the course of employment" because no single incident could be identified. The claim was ultimately allowed as an aggravation of a pre-existing condition.

Summary No. 22

In May of 1982, after 21 years of employment as an upholsterer, this worker had to lay off due to disabling pain in his right and left index fingers. In fact, he had first noticed the problem in 1978, and sought medical attention on a regular basis from that time.

The worker's family physician and his treating specialists all deemed the problem work-related.

The claim was initially allowed on an aggravation basis by the Workers' Compensation Board and paid for the period of entitlement. However, a member of the Board's staff wrote in a memo to file that arthritis was not a disability recognized under the *Workers' Compensation Act*. It was on this basis that the disability was ultimately disallowed and an overpayment established, although even the Board's own doctors agreed that the condition was related to the work as an upholsterer and should be allowed on an aggravation basis.

During the course of the investigation, the Ombudsman wrote the Board to tentatively recommend that the claim should be allowed on an aggravation basis. The Board responded that the worker's treating physicians were unable to specify a single trauma to account for the disability and that therefore there was no accident as defined by the *Workers' Compensation Act*.

Further, the Board noted in its response that the worker was suffering from a general arthritic condition and that therefore the problem in his index fingers was not causally related to his employment. Finally, the Board suggested that if the worker's symptoms had an occupational origin, they would have manifested themselves earlier.

In his final report, the Ombudsman pointed out to the Board that his reading of the *Workers' Compensation Act* clearly established entitlement for conditions that arise from the cumulative effect of one's occupation and need not be related to a specific trauma as such. He also pointed out that the worker did seem to be suffering from a general arthritic condition, but that he could not see the relevance of this issue. The worker was claiming entitlement on the basis that his work aggravated the arthritic condition in his fingers. Again, there was no need to demonstrate that the work produced the disease, only that the work aggravated the disease. Finally, the Ombudsman pointed out that he was struck by the preponderance of medical evidence both from Workers' Compensation Board medical personnel and from the worker's attending physicians that the condition had been aggravated by his work as an upholsterer.

Following the issuance of the final report, the Board accepted the Ombudsman's recommendation, cancelling the overpayment and enabling the worker to claim further entitlement should it be necessary.

In this case, chiropractic treatment was originally denied by the Board because it was considered to be merely supportive. In our opinion the treatment was enabling the worker to continue employment without lost time, and no other treatment had proven effective. The claim was allowed.

Summary No. 23

This worker sustained a disc herniation in October 1977 when he fell down some stairs in the course of his employment as an oil burner serviceman. He subsequently underwent a laminectomy and discotomy. In October 1979, he was awarded a 25% permanent disability pension. With the assistance of the Vocational Rehabilitation Division of the Workers' Compensation Board, he underwent a retraining program as a life insurance salesman and later, through his own effort, arranged for more suitable employment as a glass estimator.

Thanks mainly to regular chiropractic support which the Board authorized for approximately two years, it was the worker's experience that he was able to continue working without losing any time due to his compensable condition. In November 1982, however, entitlement for continuing chiropractic care was denied on the basis of a medical report which recommended exercises and membership in a health club rather than treatment by a chiropractor. A later report from the same doctor also indicated that no amount of chiropractic treatment was going to alleviate the worker's symptoms in a permanent way. In its decision of February 6, 1984, the Appeal Board concluded that the continuing chiropractic care was merely supportive and not therapeutic, and consequently denied the worker's request for reimbursement of costs for chiropractic treatment beyond November 1982.

After a review of the documentation submitted by the Board and the worker, we found that treatment by medication alone was insufficient to prevent the worker from losing time from work, that attempted alternative forms of care recommended by the treating specialist were without any positive results, and that the evidence on file indicated that chiropractic treatments had enabled the worker to maintain continuous employment. It was the Ombudsman's opinion, therefore, that the Appeal Board decision respecting this case was unreasonable. The Ombudsman therefore made the recommendation that the worker be granted entitlement for continuing chiropractic care.

Upon reconsidering this case, the Board revoked the previous Appeal Board decision and confirmed the acceptance of the Ombudsman's recommendation. Of paramount importance, in the Board's opinion, was the evidence on file which indicated that chiropractic treatments had enabled the worker to maintain continuous employment since 1981 without losing any time due to his compensable condition.

In this case, a commutation of the worker's pension was denied on the rather vague grounds that his request did not meet the "guiding principles" for such.

Financial gains of more than \$60,000 were at stake, increasing the worker's annual savings by approximately \$4,000. The commutation to reduce the worker's mortgage was granted.

Summary No. 24

This worker contended that the Workers' Compensation Board unreasonably denied his request for a partial commutation of his two permanent disability pensions for the purpose of reducing a mortgage on his home. The Board had ruled that his request did not meet the guiding principles or criteria for pension commutations.

Our review of the information on record indicated that the worker appeared to be a reasonable person who had rehabilitated himself subsequent to his two industrial injuries, and that he had settled into a steady and financially secure employment. It was further established on the basis of financial estimates that a substantially reduced mortgage would enable the worker to eliminate his reported monthly deficit, to save over \$1,000 annually for the next four years in interest payments, and, upon disposing of his mortgage obligations altogether, to increase his annual savings to over \$4,000. Considering that his mortgage was amortized over 15 years, it was estimated that his net saving over this period of time would amount to more than \$60,000. Even though the worker would be left with a smaller pension upon the expiry of the 15-year period, it was found that the savings that could be generated through a partial commutation would more than compensate for that reduction.

On the basis of these findings, the Ombudsman formed the tentative conclusion that the Board's position was unreasonable. It was his possible recommendation that the worker be granted the partial commutation he had requested.

In its response, the Board agreed that by commuting a portion of the worker's combined monthly pension, his financial self-sufficiency would be significantly enhanced. The Board agreed that the merits of individual judgment should prevail in this case, particularly in view of the fact that the existing guidelines relative to commutation requests permit sufficient latitude for such a determination.

Disablement need not occur during a work incident for entitlement to be appropriate. In this instance the Board was persuaded to grant entitlement for a stroke which occurred the day following the worker's volunteer fire-fighting services.

Summary No. 25

This worker was a volunteer fireman, a school custodian and a school bus driver. On a cold winter night in 1977, he was awakened to fight a fire at the country house where two of the students whom he drove lived. In the early morning after the fire was extinguished, the worker returned home and rested until it was time to begin his school-related duties. While making change at lunchtime, he leaned over to pick up a dropped coin, could not straighten up, and fell to the floor with a stroke.

His family physician advised the Board that the worker had experienced at least two warning episodes in the past, but the tension and lack of sleep involved in fighting the fire contributed to his stroke. The Board physicians disagreed, taking the view that the stroke was due to his severe, underlying atherosclerotic disease and not to his work. In June 1984, the Appeal Board accepted the opinion of its medical staff and denied the worker entitlement.

During our investigation we asked an eminent neurologist whether, in his view, a relationship existed between the events of the night in question and the worker's stroke. The specialist responded that the worker was destined to have a stroke, but the fire-fighting was a triggering and accelerating mechanism.

After the Ombudsman wrote the Chairman of the Workers' Compensation Board in September 1985 with his tentative recommendation that the worker be granted entitlement on the basis of aggravation of a pre-existing condition, the medical counsel to Research and Advisory Services at the Board reviewed all the medical documentation. He concluded that the fire-fighting events would have caused the stroke to occur earlier in time, but would not have created more severe impairment. On the basis of his review, the Committee to Review Appeal Board Decisions directed that the worker be granted entitlement for the incident.

Psychotraumatic problems can often be as disabling as the original physical injury and entitlement may prove even more difficult to establish.

Summary No. 26

In January 1978 this worker slipped and fell, injuring his knee during his work as a carpenter. Disability benefits were paid by the Workers' Compensation Board up to October 1978, when it was determined by the Board that the injured worker was capable of resuming his regular employment. The worker, however, felt he was unable to return to work and appealed for continuing benefits on the basis of his having both organic and non-organic conditions arising out of his injury.

The issue of further entitlement was heard by the Appeal Board in July 1980 and a further examination by a psychiatrist was carried out. The additional information obtained was reviewed and in its decision, the Appeal Board concluded that no evidence substantiated that the worker had either a physical or a psychotraumatic condition arising out of his accident to warrant the payment of continuing benefits beyond October 1978.

Our investigation revealed that several examining physicians felt that non-organic factors were contributing to the worker's inability to resume employment in October 1978. Further, the reports of the examining psychiatrist revealed the worker was suffering from a psychogenic regional pain and that the accident had triggered the onset of his condition. Additional medical evidence failed to substantiate that there was any physical disability in the knee as a consequence of the injury.

In the course of the investigation the Ombudsman wrote to the Board in July 1985. In that letter the Ombudsman expressed the tentative opinion that the Appeal Board had been unreasonable to deny the worker entitlement to a psychotraumatic disability award and a tentative recommendation was made that the Board accept the psychiatrists' opinions on file and award the injured worker a 5% provisional disability award, as assessed. Further, in an effort to determine the degree of the continuing condition, it was suggested that the Board undertake an up-to-date psychiatric assessment.

In August 1985 the Board wrote back stating that the Appeal Board had revoked

its decision respecting entitlement to a psychotraumatic disability award and directed that the injured worker be granted a provisional award. The award was paid from the date of accident up to the last assessment conducted by a psychiatrist in 1981. As well, the Board advised that it was making the necessary arrangements to have an up-to-date psychiatric assessment carried out and then to review the worker's ongoing entitlement.

This case proves that flexibility is necessary in the application of policy in order to ensure individual fairness.

Summary No. 27

Since 1948 this steelworker had been employed in the blast furnace area of an Ontario steel plant. It was determined that this worker was exposed to excessive noise levels for various periods of his employment, but that the noise levels, in terms of duration of exposure, did not meet the criteria utilized by the Ontario Ministry of Labour. Accordingly, the Workers' Compensation Board had denied his claim.

In October, 1984, the Ombudsman advised the Workers' Compensation Board that it was his tentative conclusion that the Appeal Board had been unreasonable to conclude that the worker's hearing loss was not the result of his employment exposure. He noted that nine co-workers who worked in the same area as this worker had all had claims for hearing loss allowed by the Workers' Compensation Board. Information was conveyed to the Board that a respected specialist in hearing loss claims felt that the worker's hearing loss was occupational in nature and that, moreover, there was no way of precisely determining the worker's exposure to noise during his early years of employment.

Available evidence indicated that the worker's noise-induced hearing loss could not be connected to excessive noise outside of the workplace and, as other possibilities could reasonably be eliminated, hearing loss related to the work environment was the logical association.

Finally, the Ombudsman noted for the Workers' Compensation Board that individual susceptibility cannot be gauged and that 10% of the population can be affected by noise levels which are below the criteria outlined by the Ministry of Labour for acceptance of a hearing loss claim. The Ombudsman felt that this worker fell into that 10% of the population susceptible to hearing loss when exposed to noise levels below the accepted criteria, and that based on this worker's likely individual susceptibility, he should be granted entitlement for industrial noise-induced hearing loss.

Following receipt of the letter, the Appeal Board reconsidered its decision and by letter of April 26, 1985, we were advised that the Board was prepared to implement the Ombudsman's possible recommendation that this worker be granted entitlement for industrial noise-induced hearing loss.

Statistical Information

Statistical Information

COMPLAINTS AND INFORMATION REQUESTS BY ORGANIZATION FISCAL YEAR 1985-86

ORGANIZATION COMPLAINED AGAINST	WITHIN JURISDICTION	OUTSIDE JURISDICTION	INFORMATION REQUESTS	TOTAL
AGRICULTURE & FOOD	<u>11</u>	<u>17</u>	<u>1</u>	<u>29</u>
ATTORNEY GENERAL	22	65	37	124
ONTARIO MUNICIPAL BOARD	23	22	6	51
PUBLIC TRUSTEE	22	9	8	39
TOTAL ATTORNEY GENERAL	<u>67</u>	<u>96</u>	<u>51</u>	<u>214</u>
COLLEGES & UNIVERSITIES	<u>44</u>	<u>95</u>	<u>20</u>	<u>159</u>
COMMUNITY & SOCIAL SERVICES	178	183	62	423
SOCIAL ASSISTANCE REVIEW BOARD	50	29	3	82
TOTAL COMMUNITY & SOCIAL SERVICES	<u>228</u>	<u>212</u>	<u>65</u>	<u>505</u>
CONSUMER & COMMERCIAL RELATIONS	<u>60</u>	<u>73</u>	<u>69</u>	<u>202</u>
CORRECTIONAL SERVICES	68	18	25	111
CORRECTIONAL CENTRES	806	61	49	916
DETENTION CENTRES	1665	53	42	1760
JAILS	1160	24	37	1221
TOTAL CORRECTIONAL SERVICES	<u>3699</u>	<u>156</u>	<u>153</u>	<u>4008</u>
CITIZENSHIP & CULTURE	<u>6</u>	<u>5</u>	<u>4</u>	<u>15</u>
EDUCATION	<u>16</u>	<u>30</u>	<u>12</u>	<u>58</u>
ENERGY	2	4		6
ONTARIO HYDRO	27	33	9	69
TOTAL ENERGY	<u>29</u>	<u>37</u>	<u>9</u>	<u>75</u>
ENVIRONMENT	<u>25</u>	<u>13</u>	<u>9</u>	<u>47</u>
FINANCIAL INSTITUTIONS	<u>7</u>	<u>11</u>	<u>6</u>	<u>24</u>
GOVERNMENT SERVICES	<u>22</u>	<u>11</u>	<u>18</u>	<u>51</u>
HEALTH	48	51	59	158
PSYCHIATRIC HOSPITALS	122	17	30	169
O.H.I.P.	21	35	18	74
TOTAL HEALTH	<u>191</u>	<u>103</u>	<u>107</u>	<u>401</u>
HOUSING	56	104	84	244
ONTARIO HOUSING CORPORATION	12	29	18	59
TOTAL HOUSING	<u>68</u>	<u>133</u>	<u>102</u>	<u>303</u>
INDUSTRY, TRADE & TECHNOLOGY	<u>2</u>	<u>3</u>	<u>4</u>	<u>9</u>
INTERGOVERNMENTAL AFFAIRS	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
LABOUR	58	38	31	127
HUMAN RIGHTS COMMISSION	29	41	16	86
WORKER'S COMPENSATION BOARD	419	726	609	1754
TOTAL LABOUR	<u>506</u>	<u>805</u>	<u>656</u>	<u>1967</u>
MUNICIPAL AFFAIRS	<u>29</u>	<u>16</u>	<u>11</u>	<u>56</u>
NATURAL RESOURCES	<u>54</u>	<u>33</u>	<u>16</u>	<u>103</u>
NORTHERN AFFAIRS	<u>4</u>			<u>4</u>
REVENUE	<u>29</u>	<u>40</u>	<u>18</u>	<u>87</u>
SKILLS DEVELOPMENT	<u>1</u>	<u>10</u>	<u>3</u>	<u>14</u>
SOLICITOR GENERAL	<u>40</u>	<u>56</u>	<u>16</u>	<u>112</u>
TOURISM & RECREATION	<u>13</u>	<u>10</u>	<u>9</u>	<u>32</u>
TRANSPORTATION & COMMUNICATION	<u>69</u>	<u>105</u>	<u>37</u>	<u>211</u>
TREASURY & ECONOMICS	<u>12</u>	<u>9</u>	<u>5</u>	<u>26</u>
ONTARIO GOVERNMENT OTHER	<u>3</u>	<u>25</u>	<u>233</u>	<u>261</u>
ONTARIO GOVERNMENT TOTAL	<u>5235</u>	<u>2104</u>	<u>1634</u>	<u>8973</u>
COURTS		294	55	349
FEDERAL		672	197	869
PRIVATE		2395	542	2937
MUNICIPAL		723	74	797
INTERNATIONAL		8	2	10
OTHER PROVINCES		28	12	40
NO ORGANIZATION SPECIFIED		42	199	241
TOTAL	<u>5235</u>	<u>6266</u>	<u>2709</u>	<u>14210</u>

Statistical Information

DISPOSITION OF JURISDICTIONAL

ORGANIZATION COMPLAINED AGAINST	COMPLAINT SUPPORTED			COMPLAINANT ASSISTED	INDEPENDENTLY RESOLVED	UNSUB- STANTIATED
	NO RECOMMENDATION	FORMAL RECOMMENDATION ACCEPTED	DENIED			
AGRICULTURE & FOOD	0	0	0	0	0	5
ATTORNEY GENERAL		1		4	1	3
Ontario Municipal Board						7
Public Trustee	1	2	1	1	1	6
TOTAL ATTORNEY GENERAL	1	3	1	5	2	16
COLLEGES & UNIVERSITIES	0	0	1	5	3	14
COMMUNITY & SOCIAL SERVICES	2	5		29	11	31
Social Assistance Review Board		1		6		25
TOTAL COMMUNITY & SOCIAL SERVICES	2	6	0	35	11	56
CONSUMER & COMMERCIAL RELATIONS	0	0	0	10	2	21
CORRECTIONAL SERVICES		1		1	3	2
Correctional Centres		1		48	45	3
Detention Centres				92	78	4
Jails				50	55	1
TOTAL CORRECTIONAL SERVICES	0	2	0	191	181	10
CITIZENSHIP & CULTURE	0	0	0	2	0	2
EDUCATION	0	2	0	0	0	4
ENERGY						2
Ontario Hydro	1			5	2	10
TOTAL ENERGY	1	0	0	5	2	12
ENVIRONMENT	1	0	0	2	0	10
FINANCIAL INSTITUTIONS	0	0	0	1	1	5
GOVERNMENT SERVICES	0	0	0	1	1	7
HEALTH			1	3		21
Psychiatric Hospitals	1			9	9	1
O.H.I.P.		3		8		4
TOTAL HEALTH	1	3	1	20	9	26
HOUSING		1		11		5
Ontario Housing Corp.				3		2
TOTAL HOUSING	0	1	0	14	0	7
INDUSTRY, TRADE & TECHNOLOGY	0	0	0	1	0	0
INTERGOVERNMENTAL AFFAIRS	0	0	0	0	0	0
LABOUR				9	2	14
Human Rights Commission	1			2		6
Worker's Compensation Board		10	2	29	6	217
TOTAL LABOUR	1	10	2	40	8	237
MUNICIPAL AFFAIRS	0	0	0	2	1	8
NATURAL RESOURCES	0	0	0	7	2	9
NORTHERN AFFAIRS	0	0	1	1	0	1
REVENUE	0	1	0	8	2	5
SKILLS DEVELOPMENT	0	0	0	1	0	0
SOLICITOR GENERAL	0	0	0	1	3	14
TOURISM & RECREATION	0	0	0	1	0	7
TRANSPORTATION & COMMUNICATIONS	1	0	0	11	3	17
TREASURY & ECONOMICS	0	0	0	6	0	2
ONTARIO GOVERNMENT OTHER	0	0	0	0	0	0
ONTARIO GOVERNMENT TOTAL	8	28	6	370	231	495

COMPLAINTS FOR FISCAL YEAR 1985-86

INVESTIGATION DISCONTINUED	ABANDONED	WITHDRAWN	SECTION 18	TOTAL
2	2	2		11
1	4	8		22
	4	12		23
4	4	2		22
5	12	22		67
4	6	11		44
27	51	22		178
8	5	5		50
35	56	27		228
6	12	9		60
26	13	13		59
235	255	219		806
516	419	554		1663
446	338	281		1171
223	1025	1067		3699
0	2	0		6
0	4	6		16
	6	3		27
0	6	3		29
1	7	4		25
0	0	0		7
1	10	2		22
2	6	15		48
28	41	33		122
1	2	3		21
31	49	51		191
2	26	11		56
3	4			12
5	30	11		68
0	1	0		2
0	0	0		0
3	10	20		58
6	5	9		29
15	48	92		419
24	63	121		506
1	14	3		29
10	21	5		54
0	1	0		4
3	6	4		29
0	0	0		1
5	5	12		40
1	2	2		13
8	14	15		69
0	2	2		12
0	0	3		3
65	1350	1382		5235

GLOSSARY

COMPLAINT SUPPORTED

NO RECOMMENDATION - At times the Ombudsman will support a complaint but decide no recommendation is appropriate given all the circumstances.

FORMAL RECOMMENDATION ACCEPTED - Those complaints where the governmental organization agrees to implement the Ombudsman's recommendation.

FORMAL RECOMMENDATION DENIED - Those complaints where the governmental organization refuses to implement the Ombudsman's recommendation. The discrepancy between the total number (58) and the fact that only 19 case summaries are presented in our Volume II is explained as follows: many cases are resolved between the end of our fiscal year (when our statistics are compiled) and the publication date of our report.

INDEPENDENTLY RESOLVED - Many complaints are resolved independent of the Ombudsman's involvement. This can occur at any point in the investigative process prior to the Ombudsman issuing a final report.

UNSUBSTANTIATED - Those complaints where the Ombudsman's investigation reveals no grounds to support the complainant's contention.

INVESTIGATION DISCONTINUED - The Ombudsman uses his discretion to discontinue an investigation at any point prior to issuing a final report for a number of reasons:

ABANDONED - Attempts to communicate with the complainant are unsuccessful (eg., complaints from inmates of correctional facilities who are released in the course of our investigation and leave no forwarding address).

WITHDRAWN - At the request of the complainant. In many cases information is provided to the complainant and, although there is no resolution the complainant does not wish us to pursue the matter.

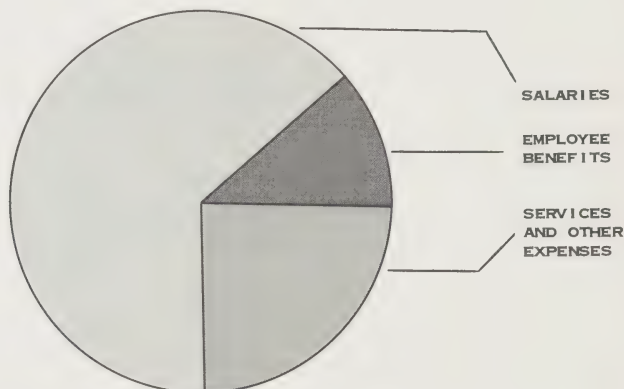
SECTION 18 - Refers to Section 18 of the Ombudsman Act which allows the Ombudsman the discretion to discontinue the investigation if, for example, there is an adequate alternative remedy or the complaint is frivolous or having regard to all the circumstances no further investigation is necessary.

COMPLAINT ASSISTED - Those complaints where the Ombudsman renders assistance and usually involve tangible corrective action taken by the governmental organization.

Statistical Information

DISPOSITION OF NON-JURISDICTIONAL COMPLAINTS, INFORMATION REQUESTS/SUBMISSIONS

Organization	Information Provided	Inquiries Made	No Action Possible	Total	Percent
Provincial	2784	799	155	3738	41.7
Federal	783	54	26	863	9.6
Municipal	735	48	14	797	8.9
Private	2821	78	38	2937	32.7
Courts and Judges	322	8	19	349	3.9
Other Provinces	36	0	4	40	.4
No Organization Specified	192	6	43	241	2.7
International	10	0	0	10	.1
TOTAL	7683	993	299	8975	100.0



ACTUAL EXPENDITURES FOR THE FISCAL YEAR 1985-86

Salaries	\$3,889,000	Other Services	169,100
Employee Benefits	547,300	Furniture & Office Equipment	86,800
Travel & Relocation	162,100	Data Processing Equipment	98,300
Telephone, Mailing & Delivery	179,200	Office Supplies & Devices	68,200
Building Rent	525,700	Books & Publications	74,100
Equipment & Other Rentals	116,000	Other Supplies & Equipment	58,900
Professional Services	76,400		

TOTAL \$6,052,000

PART II **RECOMMENDATIONS DENIED**

INTRODUCTION

Part II is devoted entirely to detailed summaries of cases where the recommendation of the Ombudsman was denied by the governmental organization.

Tables of recommendations outstanding from previous reports are included as appendices.

Detailed Summary No. 1

Mr. H's complaints against the Ministry of Education were first registered with the Office of the Ombudsman on September 3, 1985. He complained that the Minister had unreasonably declined to reinstate his Teaching Certificate following an undue delay in the consideration of the merits of his request. Further, Mr. H complained that the Minister unreasonably failed to provide him with reasons for his decision and that throughout the entire application process, he and his representatives were treated with discourtesy.

On October 8, 1985, I wrote to the Minister of Education, the Honourable Sean Conway, to advise him of my intention to investigate Mr. H's complaints. Mr. Conway was invited to provide my Office with a statement of his position with respect thereto. On January 20, 1986 we received a response from the Deputy Minister, Dr. G.R. Podrebarac, on the Minister's behalf which indicated that the Minister was not completely satisfied that Mr. H would be able to fulfill the statutory requirements relating to the duties of teachers. Dr. Podrebarac also advised that there was no statutory time limit in which a decision to reinstate a certificate of qualification must be made.

On January 22, 1986 a member of my investigative staff attended at the Ministry to review the Ministry's documentation with respect to these complaints and interviewed the Executive Secretary to the Minister's Certificate Review Advisory Committee (CRAC) which had considered Mr. H's reinstatement application and which had prepared a report for the Minister's consideration. All of the relevant documents and correspondence from the Ministry's files and from the file of Mr. F, Mr. H's legal counsel, were reviewed. Our investigation revealed the following facts.

In August, 1980, Mr. H was charged with indecent assault and illicit sexual intercourse with a minor. The minor in question was his adopted daughter, then seventeen. Mr. H was found guilty on both counts on June 30, 1981, and on July 28, 1981, he was sentenced to eighteen months incarceration plus two years probation. He was detained in the county jail in Brockville, Ontario.

Upon his conviction, the Minister of Education referred the matter of his professional standing to the Ontario Teachers' Federation with the request that they handle it according to the Relations and Discipline Procedures which are provided for in a Regulation made under the *Teaching Profession Act*. As well, the Minister granted consent to the County Board of Education which was Mr. H's employer to terminate its teaching contract with Mr. H.

On November 19, 1981, Mr. H was placed on day parole. He worked for a courier service and spent his evenings at a half-way house. Mr. H received his full parole in January 1982, six months after his conviction. In addition to the standard conditions of parole, Mr. H was required to abstain totally from the use of all intoxicants and to attend Alcoholics Anonymous meetings regularly.

During the months of February and March of 1982, the Relations and Discipline Committee of the Ontario Teachers' Federation conducted a hearing into Mr. H's conduct with a view to determining whether his Teaching Certificate ought to be revoked. In May, 1982 the Committee recommended to the Executive of the Federation that his certificate be suspended. The Federation in turn, made this recommendation to the Minister.

In January 1983, Mr. H received an early termination of his probation order as he had complied with the conditions of his parole and maintained a low profile while in the institution as well as in the community without any further police intervention.

On January 31, 1983, Mr. H applied for reinstatement of his Teaching Certificate to the Ontario Teachers' Federation. The OTF referred the matter to its Relations and Discipline Committee in February. In November, 1983 a reinstatement hearing was held at which time Mr. H and his legal counsel were present. On the basis of the submissions and the interview with Mr. H at the reinstatement hearing, the Federation recommended that the Minister reinstate Mr. H's Teaching Certificate as of January 31, 1984.

On February 28, 1984, a Ministry official wrote to Mr. H requesting that he submit a formal application to the Minister for the reinstatement of his Teaching Certificate. This was completed and sent to the Ministry on March 2, 1984.

On November 2, 1984, Dr. Stephenson, then Minister of Education, referred the matter to the Certificate Review Advisory Committee and a hearing was held on January 17, 1985.

Following the hearing, the Committee recommended to the Minister that Mr. H's Teaching Certificate be reinstated.

No action was taken on the Committee's report until August 19, 1985 when Mr. Conway wrote to Mr. H and advised that he had decided not to reinstate his Teaching Certificate at that time.

In addition to all of the above, I note that at no time has Mr. H's competence as a teacher been in question. As well, throughout this entire period the H family unit has remained united and supportive. Mrs. H has been able to supplement the family income in her capacity as a part-time teacher with a Separate School Board. With the exception of their daughter, who has not had any contact with the family since Mr. H's conviction, the children have either continued to live in the family home with Mr. H, or visit regularly when their jobs or education take them to other communities.

With respect to Mr. H's contention that the Minister's decision to deny his application for reinstatement was unreasonable, I note that the Minister had before him the following information:

1. A pre-sentence report prepared by Mr. H's Probation/Parole Officer, Ms. L. In this report, Ms. L stated that there was no evidence of antecedent criminal behaviour nor any history of sexual deviation or problems in Mr. H's background. Also, Mr. H was unanimously regarded by his co-workers as a courteous and polite individual dedicated to his teaching job which he performed in a most professional manner.

In her report, Ms. L noted that the offence for which Mr. H was convicted did not seem to express behaviour consistent with his personality as described by his family, friends and co-workers. Over the years he had expended a considerable amount of time and energy working with organizations involving young native people and young children and was regarded by his peers as an individual with a great sense of devotion and accomplishment. Ms. L noted however,

that there was concern about Mr. H's alcohol problem which he was not, prior to sentencing, prepared to readily acknowledge. However, it was Ms. L's opinion that further illegal behaviour was unlikely.

2. A psychiatric report prepared by Dr. C prior to sentencing which found no evidence in relation to disturbed sexual orientation, such as a tendency towards pedophilia, nor any evidence of any other abnormal sexual attitude. Further, Dr. C wrote that from a psychiatric diagnostic standpoint, Mr. H presented with mixed anxiety and depressive features secondary to the stress of his present predicament, in addition to features of habitual excessive alcohol abuse and some features of alcohol addiction. "I could find no evidence of any major personality defect or serious sexual deviation which in any way would make Mr. H a risk to the community at large..."
3. The report of the Ontario Teachers' Federation's Relations and Discipline Committee to the Federation's Executive, dated March 26, 1982 which found Mr. H to have failed to uphold the honour, dignity and ethical standards of the teaching profession and to be, accordingly, in breach of section 13 of the Regulation made under the *Teaching Profession Act*.
4. A psychiatric report from Dr. B, a psychiatrist with a city hospital, who wrote to the Committee that at the time of the offence for which Mr. H was convicted, he did have problems with alcohol classified as habitual excessive alcohol abuse with early signs of alcohol addiction. Dr. B wrote that since the time Mr. H started with psychiatric assistance in June of 1981 he had stayed sober and his depressive symptoms had disappeared. It should be noted that Dr. B had been seeing Mr. H as an out-patient on a regular basis. Dr. B was satisfied with Mr. H's progress, improvement and recovery and noted that there appeared to be no indications for further continuation of psychiatric treatment. It was Dr. B's opinion that there appeared to be no contraindications on psychiatric grounds that Mr. H be permitted to pursue his teaching career.
5. A letter from Mr. H's Probation Officer, Mr. R, dated May 27, 1983 which indicated that all conditions of parole were followed without problems. As well, Mr. R reported

that contact was maintained with Dr. B, who reported complete satisfaction with Mr. H's progress. Accordingly, Mr. R wrote to the OTF and indicated that he would not hesitate to support Mr. H in his endeavours to regain his teaching status as he had taken all the necessary steps to rehabilitate himself and his progress had been monitored with all indicators being positive.

6. The recommendation of the Ontario Teachers' Federation Executive, dated December 5, 1983, which recommended that the Minister reinstate Mr. H's Teaching Certificate as of January 31, 1984. In a letter dated January 5, 1984, the Secretary Treasurer of the Ontario Teachers' Federation wrote to the Ministry that:

The Committee was satisfied that the evidence submitted confirmed that Mr. H had overcome his alcohol addiction which the probation order clearly indicated had been the major problem related to his offence. It was pointed out that Mr. H was currently involved in his community and his church and has a full time position with a personnel organization.

7. A second psychiatric report from Dr. B dated December 24, 1984 which was requested by the CRAC prior to Mr. H's hearing in January 1985. Dr. B reported that he had examined Mr. H on December 5, 1984 and noted that it appeared that since June of 1981, Mr. H had stayed sober and had not had the urge to drink alcoholic beverages. Dr. B also noted that his depressive symptoms had not recurred at any time prompting Dr. B to conclude that Mr. H had overcome his difficulties. Dr. B reiterated his opinion noted above.

8. The report of the CRAC following its hearing on January 17, 1985. In its report, the Committee wrote "it is the feeling of the Committee that reaching the decision concerning Mr. H's application has already occupied a lengthy interval of time. With respect it urges an early communication of the decision, whatever it is, to Mr. H." The Committee attached importance to the facts attesting to Mr. H's exemplary behaviour in passing the stages of incarceration, parole, and probation; his acceptance of psychiatric assistance and of membership in Alcoholics Anonymous; and his search for and success in transitional

employment. Beyond this, Mr. H applied for and secured the Ontario Teachers' Federation's support. The report also noted Dr. J's reservations about the psychiatric information. However, the report went on to note that:

We feel that the shortcomings are as much or more the result of the inadequacy of the psychiatrist's reports. Mr. H's presentation on these matters was not convincing. However, the total body of information and Mr. H's total presentation indicated that he has made a good rehabilitation. After meeting with Mr. H and reading the submissions we believe that Mr. H is not likely to practise pedophilia. We are not sufficiently bold to guarantee his indefinite, much less permanent, cure from addiction to alcohol. Evidence concerning recent and current avoidance is encouraging. In short, our study of the substantial dossier and the meeting with Mr. H have satisfied us that he deserves to have his certificate reinstated and we so recommend.

With respect to Mr. H's contention that the Minister of Education unreasonably failed to apprise him of the reasons for his decision, I note that on August 19, 1985 the Minister wrote to Mr. H and advised him that he had decided not to reinstate his certificate. He stated "having considered all the information and recommendations provided, I have decided, as authorized in clause (1)(m) (sic) of the *Education Act*, not to reinstate your teaching qualification at this time."

Following receipt of the Minister's letter, Mr. F, Mr. H's legal counsel, wrote on August 26, 1985 asking for reasons. Further, Mr. F requested information as to what process he and Mr. H could expect if and when a subsequent application was appropriate. The Minister responded to Mr. F's inquiry on November 6, 1985 and while he outlined the information which he had considered in making his decision, he did not provide any reasons. Further, he indicated that there was no statutory timeline for making his decision. Finally, the Minister invited Mr. H to reapply for reinstatement of his certificate in April, 1986.

With respect to Mr. H's contention that there was an unreasonable delay in the consideration of the merits of his application, I note that on March 2, 1984, Mr. F wrote on behalf of Mr. H in order to officially apply for the

reinstatement. A letter of acknowledgement dated March 13, 1984 was apparently not received, as Mr. F wrote to the Minister on May 4, 1984 to request an answer to his March 2 letter. On June 1, 1984, Mr. F again wrote to the Minister requesting an answer to his letter of May 4. These subsequent inquiries by Mr. F do not appear to have been acknowledged or answered.

On June 4, 1984, Mr. M, M.P.P., wrote to Dr. Stephenson on behalf of Mr. H. Mr. M felt that it was unfair for Mr. H to await a response due to Ministry reorganization and requested Dr. Stephenson to review the file. Dr. Stephenson did not refer the matter to the Certificate Review Advisory Committee until November 2, 1984.

On February 15, 1985 the CRAC recommended to the Minister of Education that Mr. H's Teaching Certificate be reinstated. The Minister, then the Honourable Keith Norton, did not take any action with respect to its recommendation. Following the Ontario general election on May 2, 1985, Mr. Larry Grossman was appointed Minister of Education. Mr. Grossman did not take any action with respect to the CRAC's recommendation. On June 26, 1985, Mr. Sean Conway was appointed Minister of Education.

After carefully considering all of the evidence pertaining to Mr. H's complaints, I wrote to the Minister on February 24, 1986 and in accordance with section 19(3) of the *Ombudsman Act* advised him of my tentative conclusions and recommendations respecting this matter.

Having noted Dr. Podrebarac's submission on the Minister's behalf that the Minister was not completely satisfied that Mr. H would be able to fulfill the duties of teachers as stipulated by section 235 of the *Education Act* it was my tentative conclusion that the evidence before the Minister did not support this conclusion and that it appeared to me that the Minister's decision to refuse to reinstate Mr. H's Teaching Certificate may have been unreasonable.

I also wrote that while he did outline to Mr. F the information which he had considered in making his decision, the Minister did not provide any reasons. The reinstatement process is one in which a teacher is afforded the opportunity to convince his colleagues at the Ontario Teachers' Federation, and the Minister of his worthiness to teach. In the absence of reasons, a teacher is uncertain as to how to avail himself of that opportunity. Accordingly, it was my tentative conclusion that notwithstanding the fact that the

legislation does not require the Minister to provide reasons, the failure to do so may have been unreasonable.

Finally, I tentatively concluded that the eight months it took the former Minister of Education, Dr. Bette Stephenson, to refer Mr. H's application to the CRAC, and the additional six months it took for the final decision to be made following the receipt of the CRAC report and recommendation may have been unreasonable.

Having formed these tentative conclusions, I proposed two possible recommendations pursuant to section 22(3) of the *Ombudsman Act* as follows:

- 1) The Minister should provide reasons for his August 19, 1985 decision and, in all future cases, outline the process which an applicant is expected to employ in order to have the reinstatement of a Teaching Certificate considered, and provide the applicant with reasons for the decision taken by the Minister.
- 2) The Minister should reinstate Mr. H's Teaching Certificate.

Before reaching any final conclusions in this case I requested the Minister to respond. No response was received. However, a member of my staff spoke with a member of the Minister's staff on March 14, 1986 and was advised that while the Minister desired to make representations to me, he would not be in a position to do so immediately. In response, my investigator indicated that the tentative conclusions and recommendations noted above would be made final in light of the reporting year end deadline imposed upon me, but that it was open to the Minister to make his submissions at any time. Indeed, it was my sincerest hope that this complaint would be satisfactorily resolved through that process. Accordingly, I concluded pursuant to section 22(1)(b) of the *Ombudsman Act* that the Minister's decision to refuse to reinstate Mr. H's Teaching Certificate was unreasonable and that his failure to provide reasons for his decision was also unreasonable. As well, I concluded that the delay in which the merits of his application were considered was unreasonable.

Consequently, it is my recommendation pursuant to section 22(3) of the *Ombudsman Act*, that:

- 1) The Minister should provide Mr. H with reasons for his August 19, 1985 decision and, in all future cases, outline the process which an applicant is expected to employ in order to have the reinstatement of a

Teaching Certificate considered, and provide the applicant with reasons for the ensuing decision of the Minister.

- 2) The Minister should reinstate Mr. H's Teaching Certificate.

It will be recalled from the outset that Mr. H contended that a hallmark of the treatment which he and his representatives received throughout the reinstatement application process was one of discourtesy, particularly respecting telephone call-backs and letter acknowledgement. It was my impression that this contention is a result of the delay in making the decision and the frustration which Mr. H experienced. While there is no doubt that numerous telephone calls were made and letters written over the period of Ministry involvement, some of which were apparently not returned or acknowledged, there did not appear to be any evidence respecting discourtesy as it related to rudeness or attitude. Accordingly, I was not prepared to make a formal conclusion respecting this aspect of Mr. H's complaint, though I trust the Minister will ensure that his officials will endeavour to respond to public inquiries as quickly as possible.

My final conclusions and recommendations were reported to the Minister on March 17, 1986 and pursuant to the discretion given to me under section 22(4) and (5) of the *Ombudsman Act*, I referred the matter to the Premier on March 27, 1986. Mr. H was also advised of the results of the investigation at that time.

Since issuing my report to the Premier, I have learned that Mr. H has reapplied for the reinstatement of his Teaching Certificate, following the Minister's suggestion in November, 1985. Though it is still my understanding that the Minister wishes to make representations to me, to date no response has been received.

Detailed Summary No. 2

In January, 1985, Mrs. K brought to the attention of my Office her complaint against a Workers' Compensation Appeal Board decision dated December 6, 1984. Mrs. K contended that the Appeal Board unreasonably denied her application to reconsider its January 9, 1984 decision. In January 1984, the Appeal Board concluded that the preponderance of medical evidence did not support that subsequent to January 12, 1982 Mrs. K was experiencing any organic or psychotraumatic disability related to the compensable accident.

On January 8, 1985, the Honourable Lincoln M. Alexander, P.C., Q.C., Chairman of the Workers' Compensation Board, was notified, in accordance with the requirements of the *Ombudsman Act*, of our intention to investigate Mrs. K's complaint. Mr. Alexander was also asked whether he was prepared to make a statement of the Board's position with respect to Mrs. K's complaint. On January 23, 1985, a reply was received indicating that the Board did not wish to make a statement at that time.

Our file on the complaint was assigned to a member of my investigative staff, who thoroughly reviewed Mrs. K's Workers' Compensation Board file and considered the relevant legislation and Board policy in relation to the issue.

This report will focus only on that part of Mrs. K's complaint which relates to her psychological disability.

On November 19, 1979, Mrs. K, then 48 years old, sustained a work-related injury which was diagnosed as a lumbar strain. She received conservative treatment and returned to work on April 21, 1980. However, she laid off work on two subsequent occasions because of her back pain. Mrs. K has not returned to work since November 19, 1980. The Board granted her temporary total disability benefits for her periods of lost time between November 1979 and January 12, 1982.

The available medical reports revealed that Mrs. K was referred to Dr. S, an internist, in March, 1981. At that time, Mrs. K was complaining of chest pain which she reported had developed four years earlier, and which was accompanied by palpitations and light-headedness. Dr. S noted that, "Review of the systems turns up no important complaints except some fatigue and nervous tension." He recommended an exercise test which he noted had been attempted previously and had been unsuccessful because of acute anxiety.

Dr. G, a physiatrist, examined Mrs. K on April 1, 1981 and in June 1981. Dr. G noted that Mrs. K complained of pain radiating to her hips and her legs. He recommended hydrotherapy. In his August 7, 1981 report, Dr. G recommended that Mrs. K be admitted to the Board's hospital for further observation and physical therapy.

On October 30, 1981, Mrs. K was admitted to the Board's hospital. Dr. V, a Board physician, reported that during the examination on her admission, Mrs. K complained of low back and neck pain and dizziness. Dr. V noted that Mrs. K "... had many inappropriate responses and was tearful at times. It would seem that there are

psychological factors delaying her recovery." In his discharge report dated November 9, 1981, Dr. V noted that Mrs. K had been tearful throughout the treatment program. He was of the opinion that her emotional reaction to her pain was delaying her recovery. He felt that investigation and treatment were required.

On November 12, 1981, Mrs. K was examined by Dr. J, a Board psychiatric consultant, whose report reads in part:

The patient's description of her symptoms does not suggest any psychophysiological component, that is to say, an aggravation of muscle pain produced by tension of psychological origin. The variable hypoesthesia reported at different times on physical examination, as well as the patient's description of her symptoms and the impressions gained from observation from the patient during the interview, suggest hysterical phenomena.

As far as could be determined through the interpreter, who was not translating word for word on account of the rapidity with which the patient was talking, there was no indication of other psychopathology.

Dr. J concluded that there was evidence of pre-accident psychopathology. He was not of the opinion that there was any psychological disability attributable to the accident itself. Dr. J expressed the opinion that entitlement for compensation should be based on the "... demonstrable organic consequences of [the] injury".

Mrs. K was also examined on November 12, 1981 by a Board Orthopaedic Consultant, Dr. M. Mrs. K complained of back pain and numbness in both lower extremities and, as well, pain radiating into the shoulder and neck areas. Dr. M noted that there was "a tremendous psychogenic" component to her disability. Dr. M concluded that whatever low back contusion or strain Mrs. K might have experienced on November 19, 1979 had not resulted in any continuing type of low back disability.

When Dr. G reexamined Mrs. K on November 18, 1981, he expressed the opinion that although Mrs. K's disability seemed to be "predominantly functional" at that time, there had been "a component of soft tissue disablement". He felt that she was chronically disabled and he recommended that she be referred to a Greek-speaking psychiatrist. In his report dated January 29, 1982, Dr. G was of the opinion that there was

"... a considerable component of anxiety and very likely now emotional or psychogenic overlay." He further stated:

... I believe consideration must be given to the patient in this circumstance, for the emotional impact that her soft tissue injury is having had upon her, and this of course is a function of her pre-existing emotional fibre. In a more stalwart person, it is unlikely that this type of symptomatology would have occurred and the patient would long since have been able to return to her work, but the accident did not occur in that type of individual, rather in the type of an individual who is our patient Mrs. K, and she has been left with chronic disabling discomfort, albeit predominantly functional at this time.

In February 1982, Dr. A, a Board psychiatric consultant, reviewed Mrs. K's file. His memorandum #48 reads, in part:

... her injury was reported to the Board two and one-half years ago, but there was no firm clinical indication that we are faced here with a true and genuine post-traumatic neurosis....

Dr. A concurred with the Claims Adjudication Branch's recommendation that psychiatric entitlement should be denied.

Mrs. K received temporary total disability benefits up to January 12, 1982. The issue of entitlement to benefits subsequent to that date for an organic, as well as a psychological, disability was referred to the Claims Review Branch. It was noted that Mrs. K was not entitled to benefits subsequent to January 12, 1982 as there was no satisfactory medical evidence to support a compensable physical disability beyond that date. In addition, the Claims Review Branch concluded that it had accepted the opinion of the Board's Medical Branch and that any psychiatric disability present was not related to the industrial accident of November 19, 1979.

Mrs. K was referred by her family physician to Dr. D, a neurologist. In his report dated March 18, 1982, Dr. D noted that, on examination, Mrs. K was uncooperative and constantly complained of dizziness and pain all over her body. He was unable to reach a conclusion and he recommended that she be referred to a psychiatrist.

In a report dated March 22, 1982, Dr. C, an otolaryngologist, noted that he had examined Mrs. K at the request of her family physician. In his

report, he indicated that Mrs. K had had episodes of vertigo for 10 years, and that over the previous three months she had had almost daily episodes of dizziness. Dr. C reported that ear, nose and throat examination was normal.

Dr. B, a Greek-speaking psychiatrist, submitted to the Board a report dated March 29, 1982 in which he indicated that he had examined Mrs. K at the request of her family physician. He noted that Mrs. K was still complaining of low back pain radiating to her left leg, and of loss of balance. Dr. B expressed the opinion that there was "an appreciable functional and psychogenic basis for her symptoms." He diagnosed a "somatization disorder" which he related to Mrs. K's work accident. Dr. B noted that Mrs. K was "totally preoccupied with her symptoms and functionally very limited and therefore unemployable." He expressed the opinion that her response to treatment at that time was questionable.

In an Appeals Adjudicator decision dated August 12, 1982, Mrs. K was advised that she did not have entitlement to compensation and medical aid benefits beyond January 12, 1982. The reason given was that it had not been shown that she was suffering from a continuing physical or psychiatric disability which could be related to her compensable accident. In a January 9, 1984 Appeal Board decision, the panel noted and accepted that the preponderance of medical evidence did not support that Mrs. K had suffered from any organic or psychotraumatic disability subsequent to January 12, 1982. The Appeal Board upheld the previous decisions.

During the course of this Office's investigation, I reached the tentative conclusion, pursuant to section 22(1)(b) of the *Ombudsman Act*, that, "the Appeal Board unreasonably concluded that the preponderance of medical evidence does not support that Mrs. K suffered from any psychotraumatic disability related to her November 19, 1979 accident, and therefore was not entitled to temporary compensation benefits subsequent to January 12, 1982." Mr. Alexander and the accident employer were advised of my tentative conclusion and recommendation in letters dated May 2, 1985. In support of my tentative opinion, I gave the following information:

I am not persuaded that there is a preponderance of medical evidence which does not support that Mrs. K suffered from a psychotraumatic disability. At best, there are reports from two psychiatrists, neither

of whom spoke Greek. Dr. A's opinion is not based on a personal examination. Dr. J was not of the opinion that a psychiatric disability existed.

The other evidence is provided by Dr. G, the attending psychiatrist. He was of the opinion that consideration should be given to Mrs. K for the emotional impact that her soft tissue injury had on her. He further stated that it was unlikely that that type of symptomatology would have occurred "in a more stalwart person".

In my opinion, the most conclusive evidence was from Dr. B, the Greek-speaking psychiatrist who assessed Mrs. K. He expressed the opinion that Mrs. K was "... totally preoccupied with her symptoms and functionally very limited and therefore unemployable." He diagnosed a "somatization disorder" related to her compensable accident. It should be noted that Dr. B was the only psychiatrist to assess Mrs. K without the assistance of an interpreter.

I tentatively recommended, pursuant to section 22(3)(g), that "the Appeal Board should revoke its decision and grant Mrs. K entitlement for her psychological disability."

Mr. Alexander's response, which was received on July 23, 1985, reads, in part:

Based on the information contained in [the] medical reports, the Appeal Board is of the opinion that Mrs. K's difficulties are primarily rooted in her propensity to anxiety which is frequently commented upon by several of the attending physicians....

Though Dr. B gave a diagnostic impression of "somatization" the panel is of the opinion that this is not a firm clinical indication that we are faced with a true and genuine post-traumatic neurosis. Stedman's Medical Dictionary defines somatization as "the conversion of anxiety into physical symptoms". The fact that Mrs. K sustained what has been described as a soft tissue/ contusion injury to the back, causes the panel to conclude that this could not lead to a legitimate secondary psychotraumatic illness with a direct cause/effect relationship to her work-related incident of November 19, 1979.

Mr. Alexander concluded by stating that the panel could not agree that its decision to deny entitlement for the alleged non-organic component in Mrs. K's claim was unreasonable and, consequently, he would not implement my possible recommendation.

I again considered this case in light of our investigation and the Board's representations. The accident employer did not respond to my May 2, 1985 letter.

In considering Mrs. K's contention, I reviewed all of the medical documentation contained in her Board file in conjunction with Mr. Alexander's comments. I noted that both Dr. G and Dr. B described a direct relationship. While I acknowledged that Dr. G is a physiatrist, Dr. B was the only Greek-speaking psychiatrist to have assessed Mrs. K. In my view, Dr. B provided a specific diagnosis pertaining to a relationship between Mrs. K's psychological component and the accident.

It was my opinion, pursuant to section 22(1)(b) of the *Ombudsman Act*, that the Appeal Board unreasonably concluded that the preponderance of medical evidence did not support that Mrs. K suffered from any psychotraumatic disability related to her November 19, 1979 accident, and therefore was not entitled to temporary compensation benefits subsequent to January 12, 1982. I recommended, therefore, pursuant to section 22(3)(g) of the *Ombudsman Act*, that the Appeal Board revoke its decision and grant Mrs. K entitlement for her psychological disability.

This recommendation was included in a report to the Chairman dated October 8, 1985.

The Board had not formally responded to the report and recommendations by March 27, 1986. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

Detailed Summary No. 3

Mr. D's complaint against a decision of the Appeal Board of the Workers' Compensation Board dated February 29, 1984, was received at my Office on April 17, 1984. Mr. D contended that the Appeal Board was unreasonable to deny him an increase in the 35% permanent disability award for his industrial accident of September 13, 1967.

The Appeal Board concluded that the 35% partial disability award properly reflected the degree of residual compensable portion of the disability as a result of the industrial accident of September 13, 1967.

On May 7, 1984, the Honourable Lincoln M. Alexander, P.C., Q.C., then Chairman of the Workers' Compensation Board, was notified in accordance with the requirements of the *Ombudsman Act*, of our intention to investigate Mr. D's complaint. Mr. Alexander was invited to make a statement of the Board's position on Mr. D's case.

On May 10, 1984, the then Assistant Secretary responded on Mr. Alexander's behalf by stating that the Board did not wish to make a statement at that time.

This complaint was assigned to a member of my investigative staff, who thoroughly reviewed Mr. D's Workers' Compensation Board claim file, discussed the complaint with Mr. D, and considered the relevant legislation and Board policy and practice in relation to the issue.

Our investigation revealed that on September 13, 1967, Mr. D was struck in the back and knocked off balance by a front end loader while working as a bricklayer. He was diagnosed as having suffered acute cervical and lumbosacral strain. He was unable to return to construction work and in 1971, he was placed in a light work position as a jewel polisher, where he continued until 1980 when the deterioration of his condition forced him to retire from the workplace at the age of 46.

In February of 1972, Mr. D was diagnosed as having ankylosing spondylitis, a chronic progressive form of arthritis distinguished by inflammation and eventual fusion of a number of lumbar joints. The Appeal Board initially rejected entitlement for this condition in a decision dated April 14, 1977.

The Appeal Board, in its more recent decision dated February 29, 1984, concluded that, "The opinion of the Board's Medical Branch is that the condition, diagnosed as ankylosing spondylitis, was not the result of the industrial accident".

During the course of this Office's investigation, I reached the possible conclusion, pursuant to section 22(1)(b) of the *Ombudsman Act*, that:

The Appeal Board, in its decision dated February 29, 1984, was unreasonable in not having concluded that the non-compensable

condition diagnosed as ankylosing spondylitis was aggravated and made symptomatic by the industrial accident of September 13, 1967.

I notified the Board and the accident employer of this possible conclusion in letters written pursuant to the provisions of section 19(3) of the *Ombudsman Act*.

In support of my tentative conclusion, I referred to the following evidence:

... ankylosing spondylitis was first diagnosed by Dr. P, Mr. D's family physician, in February 1972. Dr. C, orthopaedist, in a report dated May 23, 1973, indicated that the "presumptive diagnosis of ankylosing spondylitis can now more confidently be made". Mr. D continued to receive treatment and was referred to a rheumatologist for a more definite diagnosis in 1977.

In a report dated February 2, 1977, addressed to Dr. H of the Board, Dr. O, rheumatologist, stated the following:

In regard to any possible relationship to the former injury received, one can say unequivocally that the injury did not cause the spondylitis in an etiologic sense. *However, it is quite probable that the injury may have acted as a provoking or aggravating factor, drawing attention to the symptoms of the spondylitis earlier than what might have otherwise have occurred.* [Emphasis added.]

In 1981, the Board increased Mr. D's pension to 35% from the 15% which he was awarded in 1976. The examining physician, Dr. W, noted that "if he were given entitlement at this late date for his neck, an additional 25% would be recommended. The neck symptoms, I feel, are related essentially and solely to the ankylosing spondylitis".

In a report dated November 8, 1982, Dr. B, Mr. D's treating rheumatologist, expressed the view that the 35% pension given by the Board was inappropriate and that the true disability was more likely to be 80%. This point of view was also expressed by Dr. K, Mr. D's family physician, in a report dated November 18, 1982, wherein he states that Mr. D was a candidate for an award greater than 35%.

My investigation has taken note of a report dated April 29, 1983, submitted by Dr. B to Mr. D's M.P.P., which outlined the following:

There is no question that he clinically has ankylosing spondylitis and *I have seen patients in whom the process appears to have been turned on by an accident.* [Emphasis added.] We have had a number of successful cases with this at the Workmen's Compensation Board level. It is difficult however to prove this because the disease is sporadic and is generally genetic in its susceptibility and it is equally possible that he would have developed it anyway. However, it has been my experience [sic] it has been interesting in that a number of people who had no previous back problems and then had a work-related injury subsequently getting increasing pain and stiffness throughout their back and are eventually diagnosed as ankylosing spondylitis.

My investigation has also considered the opinion of Dr. E, Board Surgical Consultant, indicating that ankylosing spondylitis is a non-compensable problem.

In my tentative recommendation, I also made reference to a complaint which had been previously investigated by my Office where the disability was also diagnosed as ankylosing spondylitis after a compensable back injury had been sustained. During the course of that investigation, my Office obtained the opinion of Dr. S, a respected rheumatologist who has a special interest in, and who has conducted research into this disease. I pointed out that Dr. S had rendered the opinion that his research had brought him to the conclusion that, "[He has] seen enough people who have had accidents to know that they can be very severe aggravators of the disease".

I further stated the following in support of my tentative recommendation:

It is my view that there is sufficient evidence on file to indicate that ankylosing spondylitis should be accepted as a compensable part of Mr. D's disability. His symptoms in the back and neck have been present and progressive since his compensable accident of September 13, 1967, and this is consistent with the nature of the disease. The opinions of Drs. O and B, rheumatologists are, in my view, supportive of a relationship between

Mr. D's accident and the activation of his ankylosing spondylitis. Further, the medical documentation on file records that Mr. D experienced no neck or back problems before the date of his accident. Aside from the fact that he had an appendectomy at the age of 20, no other medical problems are documented before the accident date. This, in my view, supports the tentative position that the trauma in September 1967 was a factor in the precipitation of ankylosing spondylitis as per the argument advanced in Dr. B's letter of April 29, 1983 and supported by Dr. O. It is also my opinion that this view is indirectly supported in this case by the previously expressed opinion of Dr. S.

It also appears inconsistent to me for the Board to have extended entitlement for Mr. D's residual low back disability and not his residual cervical problems when he is suffering from the same disease throughout the spine. The accident history clearly documents injury to the cervical area, and entitlement has been accepted by the Board. Since the cervical injury, like the low back strain, did not resolve, it would appear consistent for the Board to accept entitlement for this aspect of Mr. D's disability as well and award benefits accordingly.

I tentatively recommended, pursuant to section 22(3)(g) of the *Ombudsman Act*, that:

The Appeal Board should revoke its decision of February 29, 1984 and allow entitlement for the condition diagnosed as ankylosing spondylitis as having been aggravated by the compensable accident, and accordingly increase the 35% permanent disability award, in accordance with its policy on pre-existing conditions, to properly recognize his spinal disability.

In a letter dated May 21, 1985, Mr. Alexander responded to my tentative conclusion and recommendation. In part, Mr. Alexander indicated that during the adjudication of this claim, Dr. E, a Board Surgical Consultant, rendered the opinion that, "... a *simple traumatic episode per se*, plays no part in the essential causation of ankylosing spondylitis", and that this position was shared by his peer members within the Board's Medical Services Branch.

Addressing myself to the above, it would not appear reasonable to me to describe Mr. D's accident as "a simple traumatic episode". Documentation on file detailing the accident of

September 13, 1967 indicates that Mr. D was knocked off balance when he stepped into the path of a front end loader, the blow being severe enough to knock his hard hat off. He was struck in the mid-back, and jerked his neck back during the fall.

Further, I would agree that trauma per se "plays no part in the essential causation" of ankylosing spondylitis; however, this is not my argument. My position is that the trauma made an underlying condition, i.e. ankylosing spondylitis, symptomatic, thereby aggravating and making greater Mr. D's overall disability.

Elaboration of my argument will become clear as follows:

In his letter, Mr. Alexander goes on to state that Dr. E acknowledged that Mr. D's overall degree of disability exceeded 35% due to the co-existent diagnosis of ankylosing spondylitis; however, Dr. E expressed the view that, "This is not a condition that we can recognize as compensable in terms of our mandate under the Compensation Act".

My possible recommendation, as outlined in my letter pursuant to section 19(3), clearly stated that the Board should increase Mr. D's 35% disability award "in accordance with its policy on pre-existing conditions".

The Board's Claims Adjudication Branch Procedures Manual, Document 33-02-20, covering "Pre-existing Conditions", reads as follows: "The presence of any condition pre-existing the accident may have an influence on the extent of entitlement granted to an injured employee."

Point 4, under "General Information" in this Document, states: "Unrelated, non-occupational health problems *may exist* prior to the compensable injury, or *may arise subsequent to the establishment of a compensable claim.*" [Emphasis added.] For instance: "(e) Congenital Defects."

Under "Permanent Disability" of this same Document, Point 1. states the following:

The presence of a pre-existing condition is reflected in any permanent disability award when the degree of disability found in such cases is increased owing to the underlying condition....

The above Board policy indicated to me that the aggravation of Mr. D's pre-existing ankylosing spondylitis could indeed be considered compensable under the mandate of the *Workers' Compensation Act* and the Board's Policies and Administrative Directives dealing with the adjudication of pre-existing conditions.

Mr. Alexander, in his letter also advised me that, "The panel members are also of the opinion that the statement taken from Dr. O's report and outlined in the concluding paragraph of your submission, actually lends support to their position in this case."

Having again reviewed Dr. O's report of February 2, 1977, it appeared to me that his observation to the effect that, "It is quite probable that the injury may have acted as a provoking or aggravating factor, drawing attention to the symptoms of the spondylitis earlier than might have otherwise have occurred", clearly gives support to the argument that the trauma sustained on September 13, 1967 was a "provoking" or "aggravating factor" which made symptomatic a pre-existing condition. This evidence, as well as the opinions of Drs. B and S, supported the position that Mr. D's disability should be accepted as compensable under the above-mentioned Board criteria.

Mr. Alexander further indicated that, "The panel members have elected to confine themselves solely to the events and circumstances pertinent in Mr. D's claim", although I had compared this case and another case previously investigated by my Office where the issue under investigation was similar to this one. The Board eventually accepted ankylosing spondylitis on an aggravation basis in that particular case and granted an increase to the original pension award to recognize it.

Finally, Mr. Alexander advised me that the Appeal Board would not be implementing my possible recommendation.

Having reviewed the Board's response, I found that I had not been presented with any evidence or argument which would cause me to alter my previous position. Therefore, it was my opinion, pursuant to section 22(1)(b) of the *Ombudsman Act*, that the Appeal Board decision dated February 29, 1984 was unreasonable in concluding that Mr. D's condition, diagnosed as ankylosing spondylitis, was not aggravated and made symptomatic by the industrial accident of September 13, 1967.

I recommended, therefore, pursuant to section 22(3)(g) of the *Ombudsman Act*, that the Appeal Board revoke its decision of February 29, 1984 and allow entitlement for the condition diagnosed as ankylosing spondylitis, as having been aggravated by the compensable accident, and accordingly increase the 35% permanent disability award, in accordance with its policy on pre-existing conditions, to properly recognize his spinal disability.

This recommendation was included in a report to the Chairman dated September 3, 1985.

The Board had not formally responded to the report and recommendations by March 27, 1986, although it had sought medical clarification. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

Detailed Summary No. 4

Mr. G's complaint against the Workers' Compensation Board was first brought to my attention by letter dated May 9, 1984. On May 25, 1984, the Workers' Compensation Board was notified of our intention to investigate Mr. G's complaint that the Appeal Board was unreasonable to have concluded that Mr. G's 10% pension award properly reflected the degree of his residual organic disability. The complaint was assigned for investigation to members of my investigative staff.

In my letter written pursuant to section 19(3) of *Ombudsman Act*, I formed the tentative opinion that the Appeal Board should revoke its decision of October 3, 1983 and grant an increase to the current 10% disability award Mr. G receives in recognition of the loss of functioning in the cervical spine. Further, I recommended that Mr. G be assessed for a permanent disability award in recognition of a frozen left shoulder.

In this report, I have addressed myself solely to the issue of a pension in recognition of the frozen left shoulder. However, I am continuing my investigation with respect to Mr. G's entitlement to an increase in the pension award which recognizes the loss of capacity in his cervical spine.

Mr. G had been employed by the accident employer, a bakery, as a baker's assistant for 18 years at the time of the accident on January 11, 1979. Mr. G was lifting a pail of icing weighing approximately 35 pounds when he experienced neck and left shoulder pain, radiating down into the left arm. Entitlement was granted for a cervical strain superimposed on degenerative disc disease, at the C5-6 and C6-7 levels, and for a left shoulder strain. Full benefits were paid for the period January 12, 1979 to May 26, 1980 when benefits were reduced to 50%, continuing until September 1, 1980. Mr. G was assessed for a permanent disability award on May 26, 1980, resulting in a 10% pension. Following an appeal by Mr. G, the rating was confirmed on August 7, 1980.

My review of this file included a careful consideration of the medical evidence, both from Mr. G's attending physicians and opinions rendered by Workers' Compensation Board medical personnel.

Specifically, Dr. W, an orthopaedist, wrote on June 11, 1979 that:

This man who has complained of a considerable amount of pain in his left shoulder has mainly got I think, a frozen shoulder but he also has a fair amount of cervical spondylolysis. He definitely has some changes going down into his arms. His reflex in his triceps is absent on the left side as compared to the right. His muscle power is slightly diminished on the left side. He tends to be a little more rigid and protective of his left side than he is on the opposite side and one feels there is definite limitation of his shoulder by about three-quarters of the normal range and although I feel he has a cervical spondylolysis I believe that he also has a rotator cuff problem ... I am also going to ask Dr. S to have a look at this man to see whether or not he feels there is anything to be done about his cervical spine....

In this regard, Dr. S, a neurosurgeon, noted in his report of June 15, 1979:

On examination he had severe restriction of movement in his neck in all directions. Shoulder movement on the left was restricted and very painful on flexion, extension and rotation. The reflexes in the left upper extremities seemed to be reduced but I thought he was holding himself rather rigidly. There was apparent weakness of the left upper extremity.... X-rays were reviewed and they show considerable degenerative changes throughout the cervical spine. Undoubtedly he has cervical spondylosis and a secondary frozen shoulder.

Dr. S concluded that Mr. G ought to be admitted to the Hospital and Rehabilitation Centre for intensive physiotherapy.

Also of interest was a report dated June 30, 1981 from Dr. Z, an orthopaedist. Dr. Z noted that:

Patient has complete stocking hypoesthesia to pinprick of the left hand from the fingers to the chest.... Patient has persisting pain and discomfort in the left arm and sort of a shoulder/hand syndrome type of fashion.

In a report dated September 28, 1982, Dr. C, orthopaedic surgeon, noted that:

There was tenderness in the cervical/dorsal region with 25% range of movement and it was difficult to examine him. The right shoulder was mobile. The left shoulder was stiff.

Further, a report dated June 7, 1983 from Dr. F, orthopaedic surgeon, noted that:

He tends to hold his shoulder up in a fairly rigid fashion and has very marked restriction of motion in the left shoulder.... His neck range of motion reveals no lateral bending. Rotation is only 20 degrees and flexion/extension is nil as well.... This man has cervical degenerative disc disease with left brachalgia.

Mr. G was admitted to the Hospital and Rehabilitation Centre on August 1, 1979. The Temporary Admission and Discharge Report noted that:

This man is tender over the whole of the cervical spine, and as far as T5, and over the left scapula and left shoulder and also over the arm and the anterior chest. This seemed to be a type of skin tenderness.... He had an impairment to sensation over the whole area that demonstrates skin tenderness.

The discharge diagnosis was cervical strain with underlying degenerative disc disease.

Mr. G was readmitted to the Hospital and Rehabilitation Centre under the PSEM program on September 14, 1979.

A report by Dr. B, general surgeon, dated September 18, 1979 stated that:

I feel that Mr. G is experiencing discomfort in his neck on the basis of the degenerative changes that are present there. X-rays of his left shoulder showed no abnormalities and I am afraid that he is developing a frozen shoulder on the basis of disuse.

While noting that Mr. G appeared to be exaggerating his disability, Dr. B nonetheless made the admission diagnosis of:

Degenerative disc disease of the cervical spine; left shoulder strain; frozen shoulder.

The discharge diagnosis was cervical spondylosis, psychogenic magnification of pain, and conversion hysteria.

As mentioned above, Mr. G was assessed for a pension on May 26, 1980, by Dr. W, general surgeon. Dr. W concluded that Mr. G should be awarded a 10% pension "for his neck based on degenerative problems".

Mr. G's pension rating was confirmed on August 7, 1980 by Dr. R, who noted that:

He does have some evidence of degenerative changes in his neck.... We find that the left shoulder does some atrophy [sic] of the shoulder girdle muscles.... He has quite marked tenderness throughout the upper portion of the left shoulder arm.... His left hand did show some mild discolouration. He has quite marked gross tremors throughout his entire body. He has anaesthesia to pinprick throughout most of the left side of the body....

Dr. R noted the final diagnosis as "chronic left shoulder & neck strain", and impairment as "pain, limited function, numbness". This notwithstanding, Dr. R confirmed the award, saying there was "a very marked psychiatric &/or psychogenic problem".

On the basis of the information gathered during the investigation, I wrote to Mr. Alexander on April 4, 1985 and outlined my tentative conclusion that the Appeal Board was unreasonable to conclude that Mr. G's 10% pension award properly reflects the degree of his residual organic disability. I made the tentative recommendation that the Appeal Board should grant an increase to the 10% award in recognition of loss of function in his cervical spine, and further, that Mr. G be entitled to a permanent disability award in recognition of his frozen left shoulder.

I reviewed Mr. Alexander's response dated June 19, 1985. Bearing in mind that I was addressing myself at that time solely to the issue of entitlement to a pension in recognition of the frozen left shoulder, it was my understanding that the Board's position with respect to this issue might be summarized as follows:

- (1) Mr. G was consciously restricting and resisting movement of the left shoulder.
- (2) Mr. G was suffering from conversion hysteria; the predominant cause of continuing disability was primarily considered to be psychogenic rather than on the basis of any pathology.

I carefully considered Mr. Alexander's remarks and the findings of the Appeal Board and disagreed.

I observed that many of the doctors who had assessed and treated Mr. G, including those who supported the view that he suffers from a frozen left shoulder, had noted the existence of psychogenic symptomatology. However, I did not believe that the existence of psychogenic symptoms and an organic disability were necessarily mutually exclusive. This appeared to be borne out in this case by those reports which report on both aspects of Mr. G's disability. I was of the opinion that the Board ought not to use the existence of psychogenic symptomatology as grounds for denying entitlement to a permanent pension in recognition of his frozen left shoulder, in the presence of significant organic findings. It should be noted that I made this observation in the context of the majority viewpoint of outside consultants and at least some Board medical personnel that Mr. G suffers from a frozen left shoulder.

Further, while the Board had not accepted entitlement for a non-organic disability, I noted Dr. P's October 9, 1979 report which states in part:

I think the accident of Jan./79 is a very mild factor in his psychiatric disability.

Therefore, even if the frozen shoulder was wholly attributable to non-organic factors, which was apparently not the case as noted above, there were grounds for accepting this, even on the basis of Mr. G's non-organic disability.

It was my opinion that the Appeal Board in its decision dated October 3, 1983 was unreasonable to refuse to recognize the frozen left shoulder resulting from the work accident of January 11, 1979. [Reference: *Ombudsman Act*, section 22(1)(b)]

It was my recommendation that the Appeal Board should revoke its decision and assess Mr. G for a permanent disability award in recognition of his frozen left shoulder. [Reference: *Ombudsman Act*, section 22(3)(g)] The adequacy of the 10% award as it pertains to the loss of function of Mr. G's cervical spine, as noted above, is still under investigation, and my views on this matter will follow.

This recommendation was included in a report to the Chairman dated October 7, 1985.

The Board had not formally responded to the report and recommendations by March 27, 1986. I therefore determined that a reasonable length of time had passed without appropriate action on the Board's part and reported the matter to the Premier. The worker was advised of the results of the investigation and the file was closed.

ONTARIO OMBUDSMAN STAFF

TO MARCH 1986

AITKEN, Janet
ALLAN, John
ARKELL, Tim
AYLIFFE, Linda
BAILIE, Sam
BERNIER, Suzanne
BIDELL, Joan
BITTIRA, Gangu
BOOTHBY, Paula
BOURNS, Maureen
BRIDGER, Lynne
BROOKWELL, Larry
BUBRIN, Vladimir
BURROWS, Patricia
BYLSMA, Klaas
CAP, Wanda
CARLINO, Gerry
CARTEN, Jennifer
CHAMBERS, Sharon
CHIASSON, Lucille
CHIC, Jacquie
CONROY, Nadene
COOLMAN, Joyce
CROSSLEY, Barbara
DEPOCAS, Elise
DESBIENS, Pauline
DUNNILL, Michael
ELDRIDGE, Carole
ESTORBA, Josie
EVANS, Cathy
FELDMAN, Cara
FENTON, Mary Jane
GABRIEL, Liz
GERHARD, Perry
GIULIANI, Gary
GLICKMAN, Sheldon
GRAY, Virginia
GRIFFIN, Dianne
HARRISON, Joan
HASLAM, Susie
HAYASHI, Michael
HEAD, Sylvia
HILL, Dr. Daniel G.
HIRST, Barbara
HOBSON, Jim
HOFFMAN, Judith
HOLMES, Jackie
HOLMES, Sterling
IAHTAIL, Mary Lou
JAMIESON, Marion
JOHNSON, Gini
JONES, Christine
JOYAL, Janet
KAGAN, Kenneth

KATAMAY, Olga
KEIL, Martha
KERSHAW, Janet
KING, Dianne
KNUDSON, Inez
KUTA, Liz
LAMPKIN, Lorna
LANGELIER, Pierre
LA ROSA, George
LATINCIC, Mary Ann
LEE, Allan
LEGARDO, Lourdes
LEWIS, Cathy
LOGAN, Rosemary
LUCAS, Lourine
LYNCH, Gwen
MACDONALD, Andrew
MACEROLLO, Bob
MACKEY, David
MACNEE, Katie
MARKIEWICZ, Eva
MARTIN, Christine
MAY, Laurel
MCCOLLIN, Phyllis
MCKAY, Catherine
MCKINNON, Clarine
MCLEOD, Maret
MCNAMARA, Cecilia
MCPHEE, Sherrie
MENNIE, Florence
MESLIN, Eleanor
MILLS, Allan
MOODY, Eric
MORRISH, Ginette
MORRISON, Gail
MORTON, Margret
MURRAY, Dolly
NAISH, Doug
NOCK, June
O'BRIEN, David
ORLOWSKI, Diane
ORTVED, Janet
PANJWANI, Mohammed
PELLETIER, Allan
REID, David
ROBERT, D'Arcy
ROBSON, Donna
RODGERS, Faye
ROMAN, Josie
ROWE, Robin
RYAN, Lee
SAVAGE, Harvey
SCHARBACH, Stephen
SCHULZ, Wolfgang
SEALEY, Carol
SEMENCIW, Joe
SHULTIS, Tracy
SIMPKINS, Jan

SIMONS, Craig
SKENE, Tom
SORA, David
SOUKIE, Claude
SOUSA, Maria
STEADMAN, Dorothy
STUART, Gerald
TAMAYA, Fern
TAMBURANO, Shirley
THEN, Milan
THOMAS, Fred
THOMS, Joanne
TORRANCE, William
TROT, William
VAN KLEEF, Joy
VIRC, Elizabeth
WALCOTT, Margaret
WHEELER-MCSWEENEY, Karen
WORKU, Habte
YOUNG, Pamela
ZACKS, Michael

LANGUAGE FACILITIES

The staff of the Ombudsman's Office is multilingual. We can communicate in 28 languages.

Amharic
Cree
Croatian
Czech
Dutch
Estonian
English
Filipino
French
German
Gujerati
Hebrew
Hindi
Hungarian
Italian
Kannada
Macedonian
Oji-Cree
Polish
Portuguese
Russian
Serbian
Slovak
Slovenian
Spanish
Ukranian
Urdu
Yiddish

ONTARIO OMBUDSMAN OFFICES

KENORA

223 First Street South
Kenora, P9N 1C2
Tel: (807) 468-3091

NORTH BAY

340 McIntyre Street West
North Bay, P1B 2Z1
Tel: (705) 476-5800

OTTAWA

#702, 151 Slater Street
Ottawa, K1P 5H3
Tel: (613) 345-9235

THUNDER BAY

213 Red River Road
Thunder Bay, P7B 1A5
Tel: (807) 345-9235

TIMMINS

81 Balsam Street South
Timmins, P4N 2C9
Tel: (705) 268-2161

TORONTO

125 Queen's Park
Toronto, M5S 2C7
Tel: (416) 586-3300

WINDSOR FIELD OFFICE

P.O. Box 3275
Tecumseh Postal Station "P"
Tecumseh, N8V 2M4
Tel: (519) 974-6166

LONDON FIELD OFFICE

P.O. Box 1019
Station "B"
London, N6A 5K1
Tel: (519) 432-1117

MEMBERS OF THE STANDING COMMITTEE ON THE OMBUDSMAN

Mr. R. K. McNeil, Chairman	Elgin
Mr. N. H. Sheppard, Vice Chairman	Northumberland
Mr. M. L. Bossy	Chatham-Kent
Mr. P. Hayes	Essex North
Dr. D. J. Henderson	Humber
Mr. M. Hennessy	Fort William
Mr. A. K. McLean	Simcoe East
Mr. G. E. Morin	Carleton East
Mr. B. Newman	Windsor-Walkerville
Mr. E. T. Philip	Etobicoke
Mr. Y. R. Shymko	High Park-Swansea

CLERK: Mr. T. Decker

STAFF:

Mr. J. Bell, Counsel

Ms. M. Madisso, Research Officer, Legislative
Research Services

APPENDIX A

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	CONSIDERED IN STANDING COMMIT- TEE REPORT NO.	RECOMMENDATION DENIED	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS					
12	1	13, Rec. 6 ["7"]	1. That the Ministry reopen its file and take whatever steps are necessary to review the HUDAC and related inspection reports for those houses owned by persons who originally filed a deficiency list and who are still interested in some form of assistance from the Ministry. (It shall be the Homeowners Association's responsibility to advise the Ministry of the names of these persons.); that following this review the Ministry, at no cost to the homeowners, repair those homes which suffered damage as a result of a major structural defect relating to original construction or in which there exist substantial defects relating to original construction as reflected in the HUDAC inspection reports; that upon proof of payment of repair costs, the Ministry compensate any of the above-noted homeowners who have repaired damage to their homes caused by major structural defects relating to	1.(a) That the Ministry reopen its file on the matter and take whatever steps are necessary to review the HUDAC and related inspection reports for those houses which are owned by persons who originally filed a deficiency list and who are still interested in some form of assistance from the Ministry. (It shall be the Homeowners Association's responsibility to advise the Ministry of the names of these persons.)	On April 25, 1986, our Office wrote the Deputy Minister advising her of the Committee's recommendations, and requesting that she advise our Office as to the Ministry's plans for the implementation of the recommendations.
49			(b) Following this review, the Ministry, at no cost to the homeowners, pay or cause payment to be made for the repair of those homes which have suffered damage as a result of a major structural defect relating to original construction or in which there exist substantial defects relating to original construction as reflected in the HUDAC inspection reports.	(b) Following this review, the Ministry, at no cost to the homeowners, pay or cause payment to be made for the repair of those homes which have suffered damage as a result of a major structural defect relating to original construction or in which there exist substantial defects relating to original construction as reflected in the HUDAC inspection reports.	
			(c) If any of the above-noted homeowners have repaired damage caused by major structural defects relating to original construction, or any substantial defects relating to	(c) If any of the above-noted homeowners have repaired damage caused by major structural defects relating to original construction, or any substantial defects relating to	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN STANDING COMMIT- TEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
<div data-bbox="277 993 326 1215"> MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS (cont'd) </div> <div data-bbox="350 929 524 1222"> <p>original construction, or any substantial defects relating to original construction, as reflected in the HUDAC inspection reports; that the Ministry send reporting letters to the above-noted homeowners indicating the matters about which the homeowners complained as well as the corrective work intended.</p> <p>2. The Ministry should send reporting letters to those homeowners who are still interested (as indicated to the Ministry by the Homeowners Association), and original deficiency lists. The letter should indicate the matters about which the homeowners complained as well as the corrective work intended.</p> </div> <div data-bbox="350 404 591 768"> <p>original construction, as reflected in the HUDAC reports, then these homeowners should be compensated for their actual repair costs.</p> <p>In the Committee's opinion, the Ministry should seek contribution and/or indemnity from HUDAC for the cost of these repairs. The Committee has concluded that HUDAC's actions have in some measure caused or contributed to the Ministry's predicament and to the statements made by the Minister wherein he made commitments to the homeowners.</p> </div>					
11	10	That the Minister cancel his decision to accept the adjudicator's recommendation not to	12, Rec. 2	That the Minister of the Environment accept in principle that the Crown may, in the appropriate circumstances,	The Ministry has advised that an independent adjudicator will be asked to assess whether or not

OMBUDSMAN REPORT NUMBER	CONSIDERED IN STANDING COMMIT- TEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
<p>MINISTRY OF THE ENVIRONMENT (cont'd)</p>			
60	3,	<p>pay a claimant interest due pursuant to a term of a contract with a contractor; that the Minister consider the merits of the complainant's claim for interest owing on the principal amount in question and formulate a decision whether or not to pay the claim.</p>	<p>interest is due, and the Ministry will abide by that assessment.</p>
2	3, 34 Rec. 34	<p>That the Audit Act and the Financial Administration Act be amended to provide that when such a recommendation is made by the Ombudsman after all necessary and appropriate requirements of the Ombudsman Act have been adhered to by his Office, and when entirely accepted by the governmental organization, "a lawful authority" is created for such money to be paid by the governmental organization out of the Consolidated Revenue Fund. Further, that the Ombudsman's Office and the Ministry of Government Services resume their discussions on the merits of the Ombudsman's recommendation and that the results of these discussions are to be reported to the Standing Committee.</p>	<p>The Ministry of Treasury and Economics has responded and proposed that the Ombudsman Act is the more appropriate statute for the amendment, since the purpose of the amendment directly relates to procedure under that Act. The Ministry proposed that the Ombudsman Act be amended as follows: "Where the Ombudsman, in a report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to reimburse the complainant for an ascertainable financial loss suffered by him in the matter complained of, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at</p>
11, Rec. 4		<p>That the Ombudsman Act be amended as follows: "Where the Ombudsman, in a</p>	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	CONSIDERED IN STANDING COMMIT- TEE REPORT NO.	RECOMMENDATION DENIED	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
<div data-bbox="299 962 330 1243"> MINISTRY OF GOVERNMENT SERVICES (cont. d) </div>					
				<p>report under subsection 22(3), recommends to the governmental organization to whom the report is made that the governmental organization pay a specified sum to or for the benefit of the complainant to compensate the complainant for an ascertainable financial loss suffered by him, and where the Minister to whom a copy of the report is sent under that subsection accepts the recommendation at the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum shall, where it is less than \$1,000 and has been ascertained as required by this section, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is \$1,000 or more, it may be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned."</p>	<p>the amount mentioned therein or at a lesser amount acceptable to the Ombudsman and there is no authorization, apart from this section, for the payment of the sum so agreed on, such sum may, where it is less than \$1,000, be paid by the Treasurer out of the Consolidated Revenue Fund on the authorization of the Minister concerned, and where the sum so agreed on is \$1,000 or more, it may be paid by the Treasurer out of the Consolidated Revenue Fund on the order of the Lieutenant Governor in Council approving such payment as is recommended by the Minister concerned."</p>
					<p>The amendment will be included in the package of amendments to the Ombudsman Act.</p>

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION DENIED	CONSIDERED IN STANDING COMMIT- TEE REPORT NO.	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
<u>MINISTRY OF GOVERNMENT SERVICES</u> (cont'd)					
			12, p. 16	The Committee noted that the Attorney General has stated that recommendations for these amendments to the Act would be placed before Cabinet. The Committee expects to be dealing with them in the near future.	
			13, p. 8	The Committee recommends that the Attorney-General table immediately in the Legislature a bill amending the Ombudsman Act.	To date, no Bill has been tabled.
<u>MINISTRY OF HEALTH</u>					
Special Report Mr. F	1	That the Ministry of Health: (a) improve its methodology and data base for the routine assessment of outpatient physiotherapy service adequacy; establish procedures for continuing needs review; and develop an appropriate evaluation and feedback mechanism to assess outpatient physiotherapy needs, (b) immediately grant permission to Mr. F to purchase and transfer to his Belleville facility the privileges attached to facility licence number 34, part I, schedule 9, of Regulation 452 under the Health Insurance Act.	14, Rec. 1	That the Ministry of Health immediately grant permission to Mr. F to purchase and transfer to his Belleville facility the privileges attached to facility licence number 34, part I, schedule 9, of Regulation 452 under the Health Insurance Act.	The Ministry has been informed of the Committee's recommendation and our Office is presently awaiting the Ministry's response.

OMBSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	CONSIDERED IN STANDING COMMIT- TEE REPORT NO.	RECOMMENDATION DENIED	RECOMMENDATION OF COMMITTEE	PRESENT STATUS
<u>MINISTRY OF LABOUR</u>					
<u>Workers' Compensation Board</u>					
12	9		That the Appeal Board revoke its decision dated December 10, 1982 and grant the complainant entitlement for his late complainant entitlement for his liver disease as being causally related to his employment with the accident employer.	That the Appeal Board revoke its decision dated December 10, 1982 and grant the complainant entitlement for his late complainant entitlement for his liver disease as being causally related to his employment with the accident employer.	
12	14	13, Rec. 7	That the Appeal Board revoke its decision dated December 17, 1982 and grant the complainant entitlement to compensation benefits on the basis of an aggravation of pre-existing degenerative disc disease arising out of and in the course of his employment.	That the Appeal Board revoke its decision dated December 17, 1982 and grant the complainant entitlement to compensation benefits on the basis of an aggravation of pre-existing degenerative disc disease arising out of and in the course of his employment.	On January 29, 1986, Dr. Robert Elgie, Chairman of the Board, wrote Dr. Hill that the Board had accepted the Committee's recommendation and had directed the complainant's file to the Claims Services Division for appropriate administrative action.
<u>MINISTRY OF NORTHERN AFFAIRS AND MINES</u>					
<u>Ontario Northland Transportation Commission</u>					
Special Report Mr. R	2	14, Rec. 2	That the Pension Board allow Mr. R to make contributions for the period from six months after his initial date of employment in May 1957.	That the Pension Board of the O.N.T.C. allow Mr. R to make contributions for the period from six months after his initial date of employment in May of 1957. The Committee intends that the period of this contribution will be 18 months ending April, 1959.	Our Office has been informed that the O.N.T.C. is preparing an Order-in-Council to implement the Committee's recommendation.

APPENDIX B

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22(3)(d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
2	47	MINISTRY OF EDUCATION That a more comprehensive insurance policy be made available to students, one which would provide compensation for injuries resulting in the loss of future earning power.	May 4, 1977	The Deputy Minister took steps to meet with insurance industry representatives regarding more comprehensive insurance for students.	3, 23 Rec. 23	That the Ministry forthwith pursue its discussions with the insurance industry and other interested parties for the purpose of developing an appropriate contract of insurance in the indemnity type at a realistic premium which would adequately compensate a pupil for injuries sustained in the case of a pure accident as the result of participation in shop classes and in organized athletic activities.	The Ministry has amended s. 8(1)(i) of the Education Act as follows: "The Minister may (i) prescribe the conditions under which and the term upon which pupils of boards shall be deemed to be employees under the Act, deem pupils to be employees for such purpose and require a board to reimburse Ontario for payments made by Ontario under that Act in respect of a pupil of the board deemed to be an employee of Ontario by the Minister."
					11, Rec. 3	That recommendation 23 of its Third Report be implemented by the Ministry of Education by means of a policy of insurance on a province-wide basis before the end of 1984.	
					12, p. 9	The Committee urged the Ministry to move quickly and said it expected the recommendation to be	

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22 (3) (d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
<u>MINISTRY OF EDUCATION</u> (cont'd)							
3	40	That: 3) The Nursing Homes Act, 1972, be amended in order that provision be made for the successful candidature for the construction of a new home to make application for a conditional licence immediately upon the making of the award to him. This licence should be conditional	May 4, 1977	Agreed to implement recommendation.	5, p. 32	<p>Implemented before its next hearings.</p> <p>That the Ministry prepare an insurance program related to the injuries sustained in sports and/or shop activities by students in elementary and secondary schools which result in loss of future earnings, and that the Ministry report to the Committee.</p>	<p>At the end of November, 1985, the Ministry struck a committee of four representing different aspects of the question. The committee is obtaining advice from an insurance consultant and a positology paper will be prepared on the whole issue once the consultant's report is available.</p>
						<p>The Committee considered this complaint for the purpose of following up with the Ministry as to the implementation of the Ombudsman's recommendation as set out at pages 177 and 178 of the Ombudsman's Third Report.</p> <p>The Committee accepted the interim arrangement</p>	<p>Necessary amendments have yet to be enacted. The Ministry proposed an interim arrangement whereby on any call for proposals the Ministry will undertake to the successful proposer that he be awarded a licence provided he constructs and establishes the home in accordance with the Nursing Home Act and</p>

OMBUDSMAN REPORT NUMBER	DETAILED SUMMARY NUMBER	RECOMMENDATION UNDER SECTION 22 (3) (d) or (e)	DATE OF RESPONSE	NATURE OF RESPONSE	CONSIDERED IN STANDING COMMITTEE REPORT NO.	RECOMMENDATION OF THE COMMITTEE	PRESENT STATUS
<u>MINISTRY OF HEALTH</u> (cont'd)							
		on compliance with the terms of the proposal and any subsequent stipulations imposed by the Ministry prior to the granting of an unconditional licence.				on the understanding that the Act will be amended at some time in the future.	regulations. This interim arrangement was acceptable to the Ombudsman.
					12, p. 15	The Committee noted that it is still awaiting amendments to the legislation and will continue to monitor the Ministry's response to its recommendation.	
					13, p. 12	The Committee noted that the interim arrangement accepted by the Committee pending amendment of the Nursing Home Act continues to be followed by the Ministry and will be followed until the legislation is amended. The Committee expressed hope that the amendments will be brought forward soon.	The Ministry has advised that amendments are presently being drafted.

05455 1042

FEB 27 1991



3 1761 11547249 0